Supreme Court, U. S.
FILED
DEC 21 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

No. 79-971

ANGELO CEFALU
(Appellant ~~and Petitioner~~)

VS.

GLOBE NEWSPAPER COMPANY
(Appellee ~~and Respondent~~)

APPEAL FROM

~~AND~~

~~PETITION FOR A WRIT OF CERTIORARI TO~~

THE MASSACHUSETTS APPEALS COURT.

JURISDICTIONAL STATEMENT

ANGELO CEFALU, *pro se,*

Appellant and Petitioner,
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Dorchester, Mass. 02124
1-617-296-3222.

INDEX

	Page
Introduction	2
Opinions below	3
Jurisdiction	4
Questions Presented: On Appeal	5
On Certiorari	6
Statement of the Case	8
Argument: In General	21
On the Appeal Question	22
On the Certiorari Questions	26
Conclusion	36

Appendices

Appendix A Complaint in action Superior Court No. 4385 written by Appellant, *pro se*	A1
Appendix B Constitutional Provisions, Statutes and Rules	B1
Appendix C Order and Memorandum of Consolidation (Mass. Superior Court)	C1
Appendix D Order to Summary Judgment (Mass. Superior Court)	D1
Appendix E Summary Judgment (Mass. Superior Court)	E1
Appendix F Action on motion for Rehearing (Mass. Superior Court)	F1
Appendix G Mass. Appeals Court Decision	G1
Appendix H Mass. Supreme Judicial Court Denial of further review	H1
Appendix I Denial of S.J.C. 7851 Petition (Single Justice)	I1
Appendix J Denial of motion for disqualification (Mass. Superior Court)	J1
Appendix K Denial of S.J.C. 78-137 (Single Justice)	K1

Appendix L Mass. Supreme Judicial Court decision on S.J.C. 1519 appeal from Single Justice denial of S.J.C. 78-137...with note on West Company erroneous and misleading report of same L1

Appendix M Denial of rehearing of S.J.C. 1519 ..... M1

Appendix N Order and Memorandum by Single Justice on S.J.C. 79-46..... N1

Appendix O Notice of Appeal O1

TABLES OF AUTHORITIES

CASES:

Beacon Theaters Inc. v. *Westover* 359 U.S. 500 36

Brawer v. *Globe* 351 Mass. 53 (1966)..... 33

Chambers v. *Mississippi* 410 U.S. 284.....5, 15

Cefalu v. *Globe* 384 N.E. 2d No. 3, 1217, (Mass. Edition of Feb. 28, 1979) 19

Dimick v.*Schiedt 293 U.S. 474*..... 36

Fountain v. *Filson* 336 U.S. 681 (1949) 17, 32

Gertz v. *Welch* 418 U.S. 323 .....5, 27, 33

Herbert v. *lando,* 99 S.CT. 1635 (1979).....5, 26, 29, 30

Hutchinson v. *Proxmire,* 47 U.S.L.W. 4827.....5, 26

Roe v. *Wade,* 410 U.S. 113 .....5, 29

Roketenetz v. *Woburn Daily Times Inc.,* (1973) 294 N.E. 2d. 579..... 25

Sanders v.*Shaw* (1917) 244 U.S. 317 .....5, 15

Sartor v. *Arkansas National Gas Corp.* 321 U.S. 620 (1944) 5, 29, 30

Stone v. *Essex County Newspaper Inc.*, 364 Mass., 849..... 32

UNITED STATES CONSTITUTION

Amendment I 5, 21, 24, 33

Amendment VII 5, 6, 21, 24, 36

Amendment IX 5, 21

Amendment XIV 2, 5, 6, 21, 23, 24, 34, 36

MASSACHUSETTS CONSTITUTION:

Massachusetts Declaration of Rights Article XXIX 5

STATUTES:

28 U.S.C. #2072 25

Mass. G. L. c 231 § 59 (Repealed) 25

RULES:

Mass. R. Civ. P., Rule 56 .....4, 5, 6, 24

Mass. Supreme Judicial Court General Rules, Rule 3:25, Canon 3 C (1) 5, 14, 33, 34

TREATISES:

Wright & Miller, Fed. Practice and Procedure #2730 at 590-592..... 25

PERSONS:

Chief Justice Wilson, addressing the American Bar Association on Sept. 5, 1949, 69, S. Ct. V, VI..... 27

Cicero, addressing the court in Rome 34

IN THE

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No. ———

Angelo Cefalu (Appellant and Petitioner)

Vs.

Globe Newspaper Company (Appellee and Respondent)

Appeal From
And
Petition For A Writ of Certiorari To
The Massachusetts Appeals Court.

JURISDICTIONAL STATEMENT

ANGELO CEFALU, *pro se,*

Appellant and Petitioner,
34 Avondale Street,
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1-617-296-3222.

INTRODUCTION

I, Angelo Cefalu, the appellant, am writing this Statement myself and, although I will try to refer to myself in third person, at times, as I do now, will write in the first person.

I am an American citizen by birth but, for having been raised out of the country, I will certainly show to have some difficulty with our language. I, also, am not a lawyer and, since after I lost a summary judgment in a fraudulent atmosphere, I have not been able to find representation because the amount of work required to mount the appeal in this litigation has deterred all Massachusetts lawyers that I have contacted. I have to admit that this must truly be at least one of the reasons. Having to appear, so, pro se in this Court, as I have done in my State's courts, I will try my best to meet the requirements of this Court's Rule 23(j)(4).

I do not come to this Court for me, or at least not so much for me. Most likely, because of the power of my opponent, I will never be able to recover anything, even if I win here, for the damage that I have received. I come here on appeal, because I came to realize that a fundamental constitutional priviledge is being denied not only to me but to all, and on certiorari, because the decision and the unfair way in which it was reached in the courts of my state not only are repugnant to our American Constitution but also are in conflict with the intent of this Court's recent decisions and with the practice of all jurisdictions in our land and in all civilized societies, and affect adversely many, many citizens.

Having realized that, I, weak and inadequate as I am, cannot in all honesty decline both the opportunity and the duty to come, until somebody better shows up, and attempt to alert this Court to the danger which is posed to our society when States are allowed to successfully resist and negate the intent of the 14th amendment of our constitution which requires from them not to abridge the priviledges and immunities of any United States citizen and to apply different standards, both of law and practice, dependent more on the nature of the parties than of the issues.

OPINIONS BELOW

The Massachusetts Appeals Court's Decision here appealed is reported in the 1979 Mass. A.S.A. at page 1437 and also appears in Appendix G. The Massachusetts Supreme Judicial Court's Order denying further appellate review was issued on Sept. 28, as notified to Appellant, but reported in 1979 Mass. Adv. Sh. 2415 as on Sept. 25, 1969. App. H.

Earlier opinions and orders:

Order and Memorandum (Trial Court, Nov. 1975. Consolidating action 4385 with action 2647. Not reported but appearing in Appendix C.

Order. (By trial court, jury trial assignment session judge. Sept. 20, 1977. Directing cases to go to summary judgment hearing and to be sent back for jury trial assignment.) Not reported but appearing in Appendix D.

Summary Judgment. (Trial Court, Sept. 23, 1977. No findings of facts or conclusions of laws issued.) Not reported but appearing in Appendix E.

Denial of Motion for Rehearing. (Trial Court, Dec. 13, 1977.) Not reported but appearing in Appendix F.

Collateral decisions, revolving around a motion for relief from judgment under Rule 60(b) of Mass. Rules of Civil Procedure:

Denial by a Single Justice of the Mass. Supreme Judicial Court of Appellant's petition S.J.C. 78-51. March 9, 1978. Not reported but appearing in Appendix I.

Denial by trial court judge of a motion for his disqualification. $250 costs imposed against moving Appellant. March 29, 1978. Not reported, but appearing in Appendix J.

Denial by a Single Justice of the Mass. Supreme Judicial Court of Appellant's petition S.J.C. 78-137. June 5, 1978. Not Reported but appearing in Appendix K.

Decision by the Mass. Supreme Judicial Court on Appeal S.J.C. 1519 from Single Justice's denial of S.J.C. 78-137. Jan. 4, 1979. Reported in the Mass. Adv. Sh. (1979) page 48, also appearing in Appendix L.

This decision was also reported in the Massachusetts edition of North Eastern Reporter, 384 N.E. 2d-No. 3, Feb., 28, 1979, at page 1217, with an introduction that misled readers to believe that appeal to the full Supreme Judicial Court had been taken from the trial court rather than the Single Justice of the same Supreme Judicial Court. (See note to Appendix L). Petition for rehearing denied. Not reported but in Appendix M.

Order and Memorandum of Decision of Single Justice of the Massachusetts Supreme Court. June 1979. Not reported but appearing in Appendix N.

Denial in open court of Motion for relief from judgment under Rule 60(b) by trial court. Not reported. No notice sent. No opinion or findings of fact issued. Court rather than wait for regular court stenographer, used, over the objection of the appellant in terms of the 14th amendment, a stenographer furnished and paid by the Appellee. October 1979.

JURISDICTION

This is a *jury demanded* libel and invasion of privacy litigation in two consolidated actions, fought and decided on First Amendment issues and with the abrupt use of the Rule 56 summary judgment procedure, five days before jury trial assignment.

When Appellant claimed in appeal that Mass. Rule of Civil Procedure 56, used as it was in this type of case, infringed the constitutional right to jury trial both in state and federal sense and that "the constitutionality of Rule 56 summary judgment procedure, in any sense other than as a means to clarify issues for the jury, when applied to jury cases, has never been sanctioned by the United States Supreme Court" (Appellant's brief in A.C. 78-55, page 47), the Appeals Court of Massachusetts upheld the validity of the rule.

For that and because the Appeals Court's decision and the reviewing process, used to reach it, appear to be in conflict with the understanding and intent of the 1st, 7th, 14th, and

9th Amendments to our Constitution and of recent decisions of this Court and the practice of all jurisdictions in the land and in all civilized societies, review is asked in this Court of such Massachusetts Appeals Court decision, issued on July 11, 1979, affirming the summary judgment of the Suffolk County Superior Court, issued without findings of facts or conclusions of law on Sept. 23, 1979. A petition for further appellate review was denied by the Massachusetts Supreme Judicial Court for the Commonwealth on *Sept. 28, 1979.*

On Nov. 30, 1979 a notice was filed in the Mass. Appeals Court for this appeal and combined petition for a writ of certiorari, for which jurisdiction is conferred to this Court by 28 U.S.C. 1257 (2) and (3) respectively. Copies of this notice were also filed in Mass. Suffolk County Superior Court, in the Massachusets Supreme Judicial Court for the Suffolk County and in the Massachusetts Supreme Judicial Court for the Commonwealth, as courts possessed of record. Cases believed to support the jurisdiction are: *Gertz* v. *Welch* 418 U.S. 323; *Chambers* v. *Mississippi* 410 U.S. 284; *Sanders* v. *Shaw* (1917) 244 U.S. 317; *Roe* v. *Wade* 410 U.S. 113; *Sartor* v. *Arkansas National Gas Corp.* 321 U.S. 620 (1944); *Herbert* v. *Lando* 99 S. Ct. 1635; *Hutchinson* v. *Proxmire* 47 U.S.L.W. 4827, 4830 No. 9.

Constitutional Provisions, Statutes and Rules involved are cited in the Appendix and are: Mass. 4. Civ. P. Rule 56, 43B, M.G.L.A., 63.; Rule 56 of Mass. Rules of Civil Procedure; 1st, 7th, 14th and 9th Amendments to the U.S. Constitution (U.S.C. 1970 Edition Vol. I); Article 29 of the Massachusetts Declaration of Rights (1A, M.G.L.A., 581); Massachusetts Supreme Judicial Court General Rule 3:25 Canon 3 c (1).

QUESTIONS PRESENTED

On APPEAL:

Whether in cases of libel and invasion of privacy where a jury trial was demanded and never waived, and, five days before assignment for jury trial, assignment session judge

ordered cases to be heard in summary judgment under state accepted Rule of Civil Procedure 56, but with direction that "(a)fter hearing, cases are to be returned to the assignment session for immediate jury trial", and, on hearing, summary judgment was granted for the Appellee, the application of Rule 56 with such finality denied the Appellant the right to a jury trial, which in cases like the instant one is conferred as a priviledge to him as to all American citizens by the 7th Amendment to our Constitution and which no state can abridge by force of the 14th Amendment to our Constitution which in pertinent states that:"...No state shall enact or enforce laws which abridge the priviledges and immunities of United States citizens."

QUESTIONS ON CERTIORARI

On CERTIORARI:

I. In reachings its decision and building a base for it by eliminating one of the two cases on appeal, by discarding the issue of whether petitioner had actually been libeled or torted and damaged, by considering only biased affidavits for the respondent and calling the contents uncontroverted, after suppressing the contrasting affidavits, and by not examining at all issues in which petitioner had contested the constitutionality and validity of the very summary judgment hearing and the way it was held, did the State Appeals Court deny due process, citizens priviledges and the equal protection of the law, and show itself in conflict with the intent of relevant Supreme Court decisions and the practice of practically all jurisdictions in the nation, including its own?

II. Did the cumulative handling of this case by the Massachusetts courts at all levels effect, willfully or not, a de facto restoration of an absolute priviledge for the press and the actual impossibility for an innocent private citizen to recover for damages which he has actually suffered,

against the clear intent of Supreme Court decisions and the meaning of the First, Fourteenth and Ninth Amendments?

III. Where respondent's counsel had represented trial judge's brother-in-law and the judge had actually worked with him in that case "from 1972 through 1974"; where respondent's counsel started representation in the instant litigation on November, 1974 and after almost three years, as soon as that judge was temporarily transferred from another court to the trial court on Sept. 1st, 1977, moved for summary judgment on Sept. 15, 1977, five days before jury assignment, and in suspicious circumstances on Sept. 23, 1977 had his motion heard and allowed by that judge, whose close involvement with himself he had misrepresented, as, not only the absurdity of the contrary but, actual affidavits proved; did the fact that the State Appeals courts found that the judge did not need to disqualify himself, by suppressing affidavits and by the actual misrepresenting and changing of the applicable law, constitute and infringement of the rights included in the Fourteenth Amendment's "priviledges and immunities", "due process" and "equal protection clauses" and of the basic rights mentioned in the IX Amendment?

STATEMENT OF THE CASE

This litigation for libel and invasion of privacy sprang from and developed in the following:

On Sept. 23, 1973, Appellee published in its newspaper a picture of an unemployment line, which had been taken from a rear angle but in which it had carelessly failed to erase the face of the Appellant who, unaware, had been caught by profile and was thus clearly recognizable. The picture illustrated an article in which the head of the Employment Security was quoted as saying: "I acknowledge fraud and the fact that there are people taking advantage of the (unemployment) system". The article contained numerous other libelous innuendos and inferences about unemployed people and its very title was "A Costly Paradox: Unemployment is High, but Jobs Go Begging".

A year and a half later, on Sept. 29, 1974 the same picture with Appellant still recognizable appeared again in the same newspaper with a caption identifying the people in the line as waiting to receive unemployment checks.

Both in 1973 and in 1974 Appellant was disable and ineligible for unemployment benefits, a fact widely known among those who knew him. He had been so since 1962 and slowly but seriously he was trying to reconstruct his life with some amount of success. He was at the unemployment office to help a friend who could not speak English and at no time was he aware of or gave consent to being photographed.

After the second publication Appellant filed suit on Nov. 4, 1974, as he had already become aware of the damage done to him by the first. The litigation soon ended up in two actions, when the Appellant discovered that the original one (Superior Court No. 2647), dismissed with leave to amend, was being amended by his counsel to include strangely, only the second 1974 publication and in the ensuing disagreement he, pro se, both injected two counts for the first 1973 publication in the existing case and, sensing that he may have acted improperly, filed the same two counts as a separated action (Superior Court No. 4385).

The so disjointedly amended complaint was rejected and, although a new amended complaint containing four counts of libel and invasion of privacy for both the 1973 and 1974 publications was filed by counsel in Action 2647, the eventual allowance was affixed to a previous filed amended complaint containing only one count of libel for the 1974 publication. By that time and in awareness of all that, the second *pro se* Action 4385 survived an Appellee's motion to dismiss both on the grounds of sufficiency of claim and redundancy with the other action, and because of this redundancy was ordered consolidated with the first, in November 1975, by the court which in its Order and Memorandum mentioned: "There is no question that the drafting of this complaint is consistent in style and clarity with a *pro se* action. Nonetheless the general averments are clear enough...It appears that the subject of this suit may well be already the subject of another action in this very court. (See Suffolk Docket No. 2647.) For that reason this case will be consolidated with that action, pursuant to the provisions of Rule 42 (a) (Mass.R.C.P.)".

At the hearing on such a motion to dismiss Appellant, *pro se*, argued that 1st Amendment guarantees could not be extended to this case, where he was a private person, as this Court had already rightly interpreted that the guarantee is to protect the people from potential oppression by the government, as in Sullivan-Times, or from the danger posed by those who have power to propogate ideas affecting society in general, as in Metromedia, but not to give license to hurt with fault private persons, as in Gertz, where this Court evidently thought that the protection needed by ordinary people in that case was from the very press.

And prior to that motion, in the very complaint of the same 4385 *pro se* action Appellant had written; "Although the defendant will claim that he was trying to deal with an issue of public interest and claim First Amendment priviledge, that should not obscure the fact that the showing of the plaintiff's (Appellant's) face was neither needed nor of important to the presentation of the issue, and that such plaintiff's face easily could and prudently should have been made unrecognizable".

(See paragraph 5 of Count I of Action 4385 complaint in Appendix A.) "Such picture, although it was showing the plaintiff poorly dressed and highly recognizable, was recklessly published by defendant to illustrate an article which both because of the title and the content should have warned him (defendant) of the actual and potential defamation. (Paragraph 3. Count II)...The defendant will certainly claim First Amendment priviledge and invoke the New York Times v. Sullivan doctrine, especially as it was extended to the Rosenbloom v. Metromedia case, and require that actual malice and reckless disregard be proved, but, although recklessness is easily detected, only fault needs to be shown in this case as in Gertz v. Welch, as the plaintiff is a private person uninvolved with and unimportant to the public interest matter dealt by the 'Globe'". (Paragraph 6, Count II, Case 4385 in Appendix A.

These things were miraculously written and argued by the Appellant, when, ignorant of anything, he was struggling against time at the library, compelled to act *pro se* by the strange refusal of his counsel to include in the complaint, that he was amending, the claim of the more damaging 1973 publication. To this Court they may be important, as it would be a complete reading of the complaint appearing in Appendix A, in terms of when Appellant started debating the constitutional First Amendment issue on which the litigation was eventually decided by the Appeals Court and, for the reference to the issue of negligence, to understand why the Appellee and the court, both at the summary judgment and at the appeal level, never rested to eliminate this *pro se* action, although it had been already adjudicated to be meritorious and consolidated with the other action.

Summary Judgment Phase

After two and a half years delay Appellant experienced in March and April of 1977 two almost fatal heart attacks and cases were thus advanced and put in the Suffolk County

Superior Court Jury Trial List of Sept. 20, 1977. On ~~Sept~~ AUG. 17, 1977, Appellant, left weak by his heart attacks, under pressure by the late development of the case, had to engage another lawyer to represent him in Action 4385, which he had handled *pro se* up to then. In Action 2647 Appellant had kept his original lawyer, because he was afraid that to discharge him could be interpreted that he was cheating.

On Sept. 1st, 1977, a judge, who "from 1972 through 1974" had worked in a case of his own brother-in-law with the counsel who represented the then defendant and here Appellee, was borrowed from the Boston Municipal District Court to sit in Superior Court so called "jury waived session".

Soon after, on Sept. 15, 1977 and just five days before the jury trial assignment date, counsel for Appellee moved abruptly for summary judgment, without serving the customary 10 days notice required for such motion, but it was later discovered in the record that a seven days notice bearing his signature and marking the motion for hearing on Sept. 22, 1977 in the regular motion session had been filed.

On Sept. 20, 1977, at the jury trial assignment session the presiding judge, who happened to ha' been supported by the Appellee's newspaper in his candidacy for U.S. Representative, ordered the Appellee's motion for summary judgment away from the regular motion session to be heard on Sept. 23, 1977 by the Boston Municipal Court judge that had been borrowed to sit in the Superior Court "jury waived session".

At this point counsel for the Appellee misrepresented his connection with the temporary judge by voluntarily revealing only that he had once defended the judge's nephew and the judge was aware of that representation.

The order by the assignment session judge included the direction that "After hearing, cases are to be returned to the assignment session for immediate jury trial". (See App. D)

At the summary judgment hearing held on Sept. 23, 1977 the judge gave no hint of recognizing Appellee's counsel but, strangely, started acting as if he were a counsel for the Appellee himself and *argued* that Appellee had some kind of absolute

right to publish the picture, as has it *Candid Camera.* He also allowed Appellee to resuscitate abruptly in full summary judgment hearing the already adjudicated issue of redundancy and started pressing the new uninformed and confused Appellant counsel to abandon one case, while denying the Appellant the opportunity to speak in person to prevent such abandonment by informing both his confused counsel and the judge himself that the issue of redundancy had already been adjudicated, at a previous hearing in the same counrt on an Appellee's motion to dismiss, and solved by the consolidation.

Appellant's uninformed new counsel was thus coerced to promise the abandonment of Action 4385 and the judge requested a stipulation, saying that he was going to wait for it, but after Appellant tried to stipulate to take the redundancy away from Action 2647, rather than abandoning Action 4385, and, because of Appellee's refusal to accept this solution, he filed a motion to strike the redundancy from 2647 on the same afternoon of Friday Sept. 23, 1977 and failed to inform the judge of the new developments because he had gone home already, on Monday Sept. 26, 1977 the clerk handed to the Appellant a copy of the judgment, issued on the previous Friday Sept. 23, 1977 and signed by the judge who had stated that he was going to wait for the stipulation and by the same clerk who at closing time, on Friday, had informed Appellant that the judge had gone home. (See record, AC-78-306 App. Transcript at 45-86, and 86-90.)

The judgment isued without any findings of fact or conclusions of law said: "Judgment be entered for the defendant on all counts in Action 2647. Plaintiff in open court discontinued all claims arising out of Case No. 4385 which was consolidated herewith.", and it had been issued precipitously and in disregard of Appelant's mention of the lateness of the motion, the surprise of the issues and his right to go to the jury, among other things. (See Appendix E)

At this point the Appellant decided that he had to get back into the litigation *pro se* and fight as well as he could, as he was realizing that it was not only the case which he was losing but also his very rights as an American citizen. He retook

charge of Case 4385, although he retained his new counsel that had represented him in that case and had already joined the old counsel in the representation of Action 2647. But, soon after, the old counsel was lost over an argument arising out of the fact that he had filed a notice of appeal the next day that he had received the judgment and the Appellant had objected to his starting the appeal timetable while they were examining the option of moving for a rehearing in the same court.

The rehearing was requested, before the expiration of the ten days following the judgment, on grounds that the judge should have disqualified himself and only then the counsel for the Appellee came out in affidavit, revealing that he had actually worked with the judge in the case of the judge's relative that he had represented, but stated also that he had revealed all that prior to the judgment. (AC 78-55 App. at 192.) The absurd latter claim of complete disclosure was contested by Appellant's second counsel in a[illegible]ffidavit in support of the rehearing motion and by both Appellant's counsels in affidavits in a later motion. (AC 78-306 at 110-103.) The motion heard eventually by the same judge in his chambers and no official paper used or record taken was denied on Dec. 13, 1977 on the opinion that it had no legal basis. (See Appendix F and AC 78-306 App. at 109.)

Appeal Phase

In January 1978 Appellant's association with his last counsel was also terminated when, because of the doubts arising out of the premature filing by the old counsel of the notice of appeal in Action 2647, he moved in Appeals Court for an enlargement of time for the assembly of record and was denied, which at that time in Massachusetts meant the end of the appeal. Left alone, Appellant, now *pro se* in both cases, argued and regained the right to docket the appeal for Action 2647, which he did in late January 1978, under the number A.C. 78-55, but in Action 4385 he could docket the

appeal only in May 1978, after a long and unnecessary delay due to the funny understanding by the Superior Court clerks that they could not send a notice of assembly of record because of a pending motion for relief from judgment under Rule 60 (b) (Mass. R.C.P.), which Appellant had filed on Jan. 9, 1978. That type of motion does not stop the appeal timetable (Mass. R. App. P. Rule 4) and Appellant moved in the trial court to compel the release of the notice of record assembly and was denied. He then had to appeal to the Appeals Court which, rather than act on the Appellant's issue and make a record of the unreasonable delay, chose to only telephone the lower court to release the notice and free the way to docket the appeal. The appeal for Action 4385 was thus finally docketted, but the long delay forced the Appellant to file two separate appeals with two separate briefs and bouble duplicating appendices.

Anyway, Appellant in appeal pointed out to the court that the summary judgment had left him blind as to why it was granted. He then proceeded with raising in the two appeals 21 issues, (See Appellant's Briefs in A.C. 78-55 and A.C. 78-306) of which the most important one was that Rule 56, as it had been used, had abridged his right to a jury trial protected by both state and federal constitutions.

Addressing itself to this issue the Appeals Court in its decision eventually said: "A theme pervades his (Appellant's) briefs that anything less than the full panoply of a jury trial denies him due process. This is an untrained view of due process of law". By talking in terms of due process in the context of right to jury trial the Appeals Court certainly put words in the Appellant's mouth. Appellant was puzzled by that, as he never spoke of due process as a base for the right to jury trial, but after researching for this Statement he now understands in retrospect that the Appeals Court, as it did through the whole process of review, did build up a defeatable argument and presented it in the Appellant's name. But that is unimportant at this point, and will be discussed in the argument. What counts now is that, regardless of how the Appeals Court, in consistence with its own style, built it, the answer

does nevertheless constitute a judgment that Rule 56 is constitutional in the context presented by Appellant and that, together with the substantiality and importance of the issue, perfects the jurisdiction of this Court on this appeal.

Other issues, some carried by one case and some by the other, pointed to the lack of due process and equal protection of the law, in the way the summary judgment and rehearing motions had been handled. Appellant complained that he had been denied permission to talk, that the worst of three unequal methods of recording proceedings was used at the summary judgment hearing, resulting in missing portions of the transcript, that no record at all was taken of the motion for rehearing held in chambers, that the motion for summary judgment came too late after three years of almost inactivity, that issues, some already adjudicated and some never raised before, were brought in and dealt by surprise, that coercion had been used by the biased judge to cause the promise of abandonment of Action 4385, which, once summary judgment started, could not have been abandoned anyway.

All these issues, although questioning the validity of the very summary judgment process which led to the judgment appealed from, were never dealt with by the Appeals Court. For this reason and for the cumulative effect which the process of review together with the overall treatment at all levels suddenly revealed to have, the certiorari questions, although containing issues raised all along, in its overall form seem or could be raised only now in this Court. *(Chambers* v. *Mississippi* 410 U.S. 284, *Sanders* v. *Shaw* (1971) 244 U.S. 317)

One important issue raised in Appeals Court, as in the trial court in the motion for a rehearing and in Supreme Judicial Court in separate petitions revolving around a motion under Rule 60(b)), was that the summary judgment hearing judge should have either disqualified himself or be disqualified. The Appeals Court found that it was not so and it became impellent to bring to this court a certiorari question on the subject, not so much because of the error, but because of the way the Appeals Court handled the issued, that is by suppressing evidence and affidavits and deleting and twisting the applica-

ble law,and because an area like this, where the equal protection of the law depends so much, cannot be left to the state alone to decide. Certainly not when the highest state court to deal with the issue betrays a suspicious attitutde itself and the Appellee, a big newspaper, at the same time that was granted summary judgment by the trial judge, whose impartiality is questioned, was also granted a national award for having exposed corruption (selectively) in the state governments and courts.

Of course the overall issue that the First Amendment did not require the judgment nor it affirmance in favor of the Appellee was raised not only in Appeals Court, as part of the general issue that the trial court had also erred as a matter of law, but much earlier in the original *pro se* written complaint in Action 4385 and at the recorded hearing on the Appellee's motion to dismiss that same action. (See App. A) A question concerning this issue is brought to this Court on certiorary.

The Appeals Court heard oral argument on the appeals on April 12, 1979 and, contrary to the requirements of Rule 22 of Mass. R.A.P., no opportunity to rebut the surprises of the Appellee was given to the Appellant who was told by the court that rebuttal was not used and that he had to depend on the intelligence of the judges. Of course, as the Mass. Appeals Court also uses not to record oral arguments this fact and others cannot be referred to any record.

On July 11, 1979 the Appeals Court issued the decision appearing in the Appendix G, where in general it affirmed the summary judgment as a requirement of the First Amendment. In particular it reached that conclusion with the following dubious process. Although the summary judgment did not state or show any reasons for its granting (A.C. 78-306 App. at 89 and at 45-86) and the transcript clearly shows that the judge at the summary hearing never thought or entertained the subject of negligence, but had only advanced the idea the Appellee had a priviledge, seemingly absolute, of the *"Candid Camera"* type, the Appeals Court abruptly came out with the opinion that Appellant could not pierce the priviledge of the Appellee because it had not proved the latter's negligence.

All that did come out in complete disregard of the fact THAT summary judgment was not fought on negligence (See Transcript at Supra.) and the principle already upheld in this Court that the Appellant should not be first challenged on other issues and then be told that he is wrong because he did not satisfy another issue, *Fountain* v. Filson 336 U.S. 681, (1949), apart from the fact that he satisfied anyway. In fact and moreover the Appeals Court built the opinion of no negligence by eliminating Action 4385 and, the very issue of libel and by the outright suppression of affidavits and facts to avoid to look at what pointed to or proved the negligence or, at the very least, caused an inference of it, to be decided by a jury. (Compare appeals court briefs and decision.)

The same suppression of evidence and affidavits plus the misapplying, misrepresenting and twisting of the law was needed by the Appeals Court so that it could decide that the trial judge did not need to disqualify himself. Of course, as it was mentioned before, the court also answered in the negative the Appellant's question as to whether Rule 56 had been used unconstitutionally and unexplainably ignored most of Appelant's issues questioning the validity of the very process used in the trial court. (Compare Mass. Supreme Judicial Court Gen. Rule 3:25 Canon 3 C(1) and decision; also briefs in Appeals Court and decision.)

Collaterally and in connection with a motion for relief from judgment under State Rule of Civil Procedure 60 (b) filed in the trial court on Jan. 9, 1978 before the docketing of the appeals, Appellant was in the state Supreme Judicial Court with a petition under Mass. General Laws Ch. 211 Sect. 3, trying to free himself from having a motion to disqualify the trial judge from hearing the motion under 60 (b) heard by the same judge. Under Mass. General Laws Ch. 211 Sect. 3 in Massachusetts one can go to the Supreme Judicial Court, and only to that court, if he has no other remedies available and for that reason the Appellant's petition (Mass S.J.C. 78-51) was denied on March 9, 1978. The Appellee, and he technically right, had argued that the state High Court could not act on the matter because Appellant could have obtained relief in

the Superior Court where the motion for disqualification had not been marked yet for hearing; but when Appellant had the motion for disqualification heard in Superior Court by the same judge that he wanted disqualified, at a hearing where record was not taken, although it had been requested and motioned for, the Appellee told the judge that the State High Court had already ruled on the matter and the judge, encouraged, denied the motion and slapped 250 dollars costs on the Appellant, who, for the general issue of disqualification and for the added 1st and 14th Amendment issues derived from the punitive costs and the refusal to take a record, went back to a Single Justice of the Supreme Judicial Court with petition S.J.C. 78-137. Here Appellee's counsel misrepresented again that the matter had already been explored by the previous Single Justice who had heard the previous S.J.C. 78-51 petition and that the issues brought by Appellant were already present in Appeals Court. The Single Justice, having to believe the member of the bar rather than the awkward *pro se* Appellant, denied the petition on June 5, 1978, but without prejudice to the pending appeals. Frustrated the Appellant appealed that Single Justice's decision to the full Supreme Judicial Court, to argue that, although he did not think that he had abused its discretion, in the sense, as he said, that he had not shown to be hostile, the Single Justice had nevertheless erred in believing that the issues were already in Appeals Court, as the Appellee had misrepresented. (See App. I, J, K.)

But the full Supreme Judicial Court too avoided the issues, which were blatantly revolving around a motion under Rule 60 (b), that had not been yet heard in the trial court, and, therefore, could not have possible been in appeal yet, and decided that they were actually present in Appeals Court, but allowed the Appellant to go back to a Single Justice of the S.J.C. for the 250 dollars costs issue, which was directed to be taken against the State Attorney General rather than against the Appellee. But the decision, issued on Jan. 4, 1979, per curiam, in its first paragraph was ambiguous in a way prejudicial to the Appellant and its pending appeals. (See App. L.)

The first paragraph said: "Absent an abuse of discretion

there is no error in denying a petition under G.L. c.211 sect.3.". Although Appellant and the Court knew that it was the Single Justice of S.J.C. 78-137 the one who was meant not to have abused its discretion, readers who did not know the context of the appeal could have mistakenly extracted the meaning that it was the trial judge, and so Appellant asked for a rehearing to clarify the point, but that was denied. (See App. M.)

That decision was then reported in the Feb. 28, 1979 advanced Massachusetts Edition of West Publishing Company North Eastern Reporter (*Cefalu* v. *Globe* 384 N.E. 2d-No. 3, page 1217) with an introduction that said: "Petition for superintendence of inferior courts was denied by the *Superior Court, Suffolk County*, and plaintiff appealed. The Supreme Judicial Court held that absent an abuse of discretion, there is no error in denying a petition under statute authorizing superintendence of inferior courts to correct and prevent errors. "Appellant requested West Company by mail and by telephone to promptly correct the error as it was very prejudicial to the coming appeals in Appeals Court, but was told that the error could be corrected only in the book edition to be published in a couple of years.

Appellant will never know how prejudicial that reporting may have been, as it is very difficult to guess what effect it may have on a judge a quick reading of an advanced West Company North Eastern Report, but it is puzzling to him why West Company published that the petition for superintendence of inferior courts was originated and denied in Superior Court, Suffolk County, when there was no way to understand that from the official documents, which clearly showed that the appeal to the full Supreme Judicial Court (S.J.C. 1519) was from a judgment of a Single Justice of The Supreme Judicial Court and when nobody who is involved in the field of reporting, here in Massachusetts, in Mineola, New York or St. Paul, Minnesota can pretend not to know that a petition for Superintendence of inferior courts under Mass. G.L. Ch. 211 Sect. 3 can only originate in Supreme Judicial Court.

The 250 dollars costs were lifted by another Single Justice in June 1979, when Appellant took up the issue with the Massachusetts Attorney General as the state High Court had directed. (See App. N.)

As for the motion for relief from judgment, when Appellant, after the Appeals Court final decision and the Supreme Judicial Court denial of further appellate review, marked it for hearing in the trial court, it was denied as frivolous by a regular motion session judge in open court at a hearing where the court, rather than waiting for a regular court stenographer, used a stenographer furnished and paid by the Appellee, over the Appellant's objections in terms of 14th Amendment protection. Of course, the judge did not bother to read either the motion or the affidavits in support of it. And that was consistent with the story of this litigation, which not only was denied the opportunity to go to the jury, but, also and hostilely, was denied to be considered on the merits. There was always some reason not to hear the Appellant.

ARGUMENT.

IN GENERAL:

The State appeals court has dealt in its decision with issues of libel and invasion of privacy which involve the media and private persons and by necessity the meaning and effect of the *First Amendment.* In the process it has felt the control of and the duty to rely upon past and recent decisions of this Court and at the same time it has showed resistance to accept and follow the spirit of such decisions and it seems that in order to give back to the media the absolute priviledge that this Court has already denied, has used rules and ways which are repugnant to the Constitution of the United States in terms of 1st, 7th, 14th and 9th Amendments.

This case is only one of the many all over the country which show the states resistance to accept the principle emanating from this Court that weak private persons need to be protected from the powerful and influential media, although a pretense is shown to the contrary.

In this case, handled in a biased court, appellant had his priviledge to have a jury trial in this particular type of case abridged, and, apart from that, he was denied due process and the equal protection of the law and the right to present his griviances to the court without hindrances and to be heard.

Although the Constitution was meant to protect each and every individual, he understands that if it was only because of himself perhaps it would not be right to take the precious time of this Court, which has to deal with many things more important than him; but here we have a problem that is not only the appellant's, but of millions of weak citizens whom state courts abuse, not only by erring against them, which fact alone certainly would not be enough to interest this Court, but by denying them constitutional rights which are elementary to every American, and to all members of civilized societies, in a persistent effort to confuse an issue which this Court has meant to solve many times and because of the states sabotage still remains unsolved.

Where State Court has relied upon a prior Supreme Court decision, or a constitutional principle previously established by this Court, that is now ripe for reconsideration and possible overruling or change, this Court has shown interest.

I believe that this Court will get a feeling from this case that things are ripe for a reconsideration of what the issues of libel and invasion of privacy are doing to our Constitution and claim jurisdiction both on appeal and certiorari to clarify to the states once and for all that there is no absolute priviledge for the press under the First Amendment and that they are not free to interpret that Amendment differently from this Court, or to destroy in the name of that Amendment the rights of other Amendments and the finest values of our culture, all to twist back a de facto absolute priviledge to the effect that innocent private citizens, minding their honest business, can be damaged impunely.

ON THE APPEAL QUESTION.

Appellant is aware that this Court at times has said that the denial of a jury trial by a state does not necessarily infringe the requirements of due process. Perhaps for that reason the Appeals Court said in its decision that appellant's idea was that "anything less than the full panoply of jury trial denies him due process" and that "(t)his is an untrained view of due process of law".

The Appeals Court's sarcastic connotation of the jury trial as panoplic, which to the untrained simple American appellant sounds a bit blasphemic, should by itself make this Court aware of the dislike that certain judges have of an idea so fundamental in our culture and so sacred in our minds. Also this Court should notice and disapprove that the Appeals Court put in the appellant's mouth words that he never spoke.

To talk of due process in the context of jury trial may be convenient to the State Appeals Court, but appellant never talked of due process in his issue of right to jury trial and he was not talking of a general right to a jury trial either. He

does understand that one "*can*" have due process without the need of a jury trial in some cases, and even in most cases, but he was talking about this particular case whose nature called for a jury trial, as it would have at the time the seventh Amendment was written to guarantee that type of trial to Americans for ever. Of course the question is whether the states are required, or, to say it more truthfully, whether they can continue to evade to also furnish or respect that guarantee.

Appellant's argument is different from that which is implicit in the Appeals Court decision and in other cases that have reached this Court. Of course he agrees that it is the argument of an untrained man but he does not concede that that alone would make it wrong. He believes that the Amendments were meant to protect the rights of citizens anywhere in the land and in any situation, as it would not have made sense otherwise, and that only because of the effective resistance of those who wanted to deny those rights in the name of state freedom, as they still try, the XIV Amendment had to be written to assure the original intent.

That resistance to respect the amendments rights was bound to appear it can be easily understood if one considers that our forefathers had to make the protection of those rights a fundamental law because we are the very kind of people most apt to deny those rights to ourselves. And, so, the XIV Amendment was needed and written to say that: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the priviledges and immunities of United States citizens; nor shall any state deprive any person of life liberty, or property, without due process of law; nor deny any person within the jurisdiction the equal protection of the laws".

The appellant, born in Boston, although raised out of the country and having, thus, difficulty in expressing himself well, is amply a citizen of the United States in the sense of the XIV Amendment, and although he is also a citizen of Massachusetts, he has priviledges and immunities, as a United

States citizen, which no state can abridge; nor can any state deprive him, as a person, of life liberty or property without due process of law; nor of the equal protection of the laws. Inasmuch as it pertains to this appeal's question of whether the use made of Rule 56 infringed on the constitutional right to jury trial let us forget the due process clause, although, if it is found that the right to a jury is founded otherwise, the state court's denial of such right would show in itself a lack of due process. Let us forget also the equal protection clause, although with some difficulty. We will concentrate instead on the "priviledges and immunities of citizens of United States" clause. Under the Seventh Amendment", "(i)n suits at common law, where the value exceeds 20 dollars" the Appellant has "the right of trial by jury" which "shall be preserved". That is a priviledge conferred to him as an American citizen, just as good as and equal to the priviledge to speak or print or practice religion freely or not to be hindered when asking the government for a redress of grieviances. But here we are being told that we do not have that priviledge in the state and that the Seventh Amendment has not been *"incorporated"* yet in the XIV.

But on what doctrine? What theory? What logic? Is it because the Seventh Amendment mentions the *Courts of the United States* and that is interpreted to mean only federal courts? But, if so, can we use this rationale without using it also with the First Amendment, where it is said that *"congress"* shall make no laws...etc.?

Is it meant that First Amendment priviledges are important and fundamental and Seventh Amendment ones are not? But was not the right to jury trial important and fundamental at common law or in English jurisprudence? If not, why and how did it happen to end up in the Constitution? Or is it meant that the Seventh Amendment priviledge is less important than other Amendments priviledges and by inference not important or fundamental enough to be incorporated? But, even if it were so, where is it said in the Fourteenth Amendment that the forbiddance to abridge United States priviledges is proportional to the importance or fundamentality of such priviledges?

Of course these are only rhetorical questions, since we all understand and know, even if some do not want to, that the Seventh Amendment right to a jury trial is an important and fundamental priviledge which every American citizen has and cannot be abridged by any state, not even by means of Rule 56.

How the indiscriminate use of this rule has more and more become offensive to the Constitution in terms of effecting often a denial of a right to jury trial can also be seen from another angle.

A theory has been developed with a false logic, that, as the jury tries only facts, one needs to go to the jury to try facts and only if there are facts to try, which, as the faulty reasoning induces to conclude, will be decided by a judge. A base was so developed for using Rule 56 in all cases and effect a denial of the right to jury trial with a parvence of legality. But the major premise that is conveniently left out is that the right to jury trial in certain cases did not derive from what the jury did or could do. The courts could find facts too and never needed the jury for that. The right to jury trial was established because the people did not trust that the courts would always examine and find situations rightly. That right, for cases of a certain nature, as the instant one, in America is protected by the Constitution.

Rule 56, moreover, was taken from the federal rules and its interpretation and use is therefore dependent on the intent of the enabling statute 28 U.S.C. #2072, where Congress, in delegating to the Supreme Court responsibility for drawing up rules, declared that; "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution". Of interest at this point is to notice that at the time that the Massacusetts legislature enabled the Mass. courts to adopt the federal rules, the summary judgment procedure could legally be used in a few type of cases and certainly not in cases of tort. Mass. G.L. c. 231 §59 (Repealed) "Summary judgment is not available in tort actions." *Roketenet* v. *Woburn Daily Times Inc.* (1973) 204 N.E. 2d 579, 584 N. 5.

The substantiality of the question that Appellant has raised in this appeal does also appear when one realizes how dangerous and abusing Rule 56 is becoming all over the country. This may have already become apparent to this Court, when its attention was attracted, in *Hutchinson* v. *Proxmire,* by the idea expressed by the district judge in that case, "that in determining whether a plaintiff has made an adequate showing of "Actual Malice" summary judgment might well be the rule rather than the exception" *Hutchinson* v. *Proxmire*, 47 U.S.L.W. 4827, 4830 (June 26, 1979). The Court seemed alarmed by such proposition and felt compelled to say at Page 4830, No. 9, in that case: "Considering the nuances of the issues raised here, we are constrained to express some doubt about the so called "rule". The proof of actual malice calls a defendants state of mind into question, *New York Times* v. *Sullivan* 376 U.S. 254 (1964) and does not lend itself readily to summary disposition. See *Wright & Miller, Fed Practice and Procedure* #2730, at 590-592. Cf. *Herbert* v. *Lando* __ U.S. __ (1979). In the present posture of the case, however, the propriety of dealing with such complex issues by summary judgment is not before us".

It seems that the Supreme Court considers the situation ripe to explore the issue and, if it did not have the opportunity to do so in *Proxmire*, it may find that it has it now with the appeal question that the Appellant has presented.

ON THE CERTIORARI QUESTIONS

Here again on certiorari, as in appeal, the intention is not to show that Appellant did suffer a wrong decision, but to alert this Court that the ways used in reaching that wrong decision infringed many constitutional rights, they show conflict with principles of law established in this Court and the practice of practically all jurisdictions in the land, and, for the fact that those ways are hidden behind a facade of correctness, both of process and reasoning, they constitute and pose a great danger to the value of our courts and conse-

quently to the people.

To say it in words of *Chief Justice Wilson addressing the American Bar Association on Sept. 7, 1949, 69 S. Ct. V, VI,* although he certainly must have never anticipated somebody like me and I have to use those words with humility, I come to this Court to "represent not only" me, as a particular Appellant, "but tremendously important principles, upon which are based the plans, hopes and aspirations of a great many people throughout the country".

In order to reach a decision, that seems to have been preconceived, the State Appeals Court had to surmount many obstacles and proceeded to eliminate them, unlawfully under our constitution and unfairly under any standard.

The first obstacle it dealt with was the existence of the consolidated Case 4385. As the pleadings and the issues of that case would have prevented at least the logic of the decision, the Appeals Court eliminated it quickly in Note 2, see Appendix G1, by curtly saying: "On the view that we take of the case, the propriety of the disposition of No. 4385 is academic because the entry of summary judgment in the first case No. 2647 disposes of both cases on the merits. "But the lack of due process in this act is easy to see. Later on the Appeals Court was going to decide the entire appeal on negligence, in particular, and on the 1st Amendment, in general, and in that context the pleadings of that case, although they had been written by the ignorant *pro se* Appellant, happened to point out how and why the Appellee had been negligent, and right from the start, that in light of the Supreme Court Decision in *Gertz* v. *Welch,* the First Amendment could not mean that Appellant could not recover for the damage that he had received (See Supra and in Appendix A.). So, both in terms of deciding the issue of negligence which the Appeals Court brought in by surprise at the appeal level, and because of the importance of the First Amendment argument on which the appeal was in general decided, the case was improperly eliminated, although conveniently.

Prior to the summary judgment the case had been consolidated in the same court as a result of the denial of an Appellee's previous motion to dismiss on grounds of not stating a claim and redundancy under Mass. Rule of Civil Procedure 12 b (6) and (9). This was narrated supra in the statement of the case, but here it is perhaps important for this Court to notice that in avoiding to deal with Case 4385, the State Appeals Court avoided also to look at how the judge at the summary judgment hearing had gone out of his way to get that case eliminated. Against the principles of due process and of the law of the case, the judge had allowed Appellee to raise again by surprise in full summary judgment hearing the issue of redundancy which had been properly and finally ajudicated already in the same court, entertained it and, in the process, coerced a promise of abandonment of the case from the confused counsel, who had entered the case just a month before to replace the Appellant, weak from his heart attacks, while denying the Appellant the opportunity to speak and explain why, in light of the previous consolidation, what the judge and Appellee were driving at was illegal.

A copy of the original complaint, written *pro se* by the Appellant is accluded as Appendix A, not for the consideration of its merits, but so that this Court may perhaps have the opportunity to study whether the elimination of Case 4385 was necessary to reach the decision here to certiorari, and was effected with ill intent.

Another blow to due process was given by the State Appeals Court in Note 3 of the decision where, in order to get rid of another obstacle, it eliminated the need to deal with the issue of libel itself. In that note, although allowing that "presumably the plaintiff find obloquy by association with aspects of the text of the articles which the photograph illustrated", the Appeals Court stated: "We do not reach in this opinion whether the photographs were defamatory so far as Cefalu is concerned".

But in doing that the court did, conveniently and one wonders if purposefully, eliminate facts which were basic to the very issue of negligence, with which, abruptly and in conflict with the very trial judge, it had chosen to steer the appeal toward its unfair conclusion. It gave itself the opportunity to

eliminate the fact that the 1973 article illustrated by the picture was portraying unemployed people as lazy and cheaters with inferences and assertions which included a quoting of the head of the Mass. Employment Division as saying, "I admit fraud and the fact that there are a lot of people taking advantage of the system".

How could the court have concluded that there was no negligence on the part of the publisher who did not even try to conceal the face of the Appellant, or, better, how could it have avoided sending the cases to the jury, if it had considered the content of the article which, by the way was pointed out to the State Courts at all levels repeatedly in pleadings, in briefs, in affidavits and arguments. Moreover, and I hope that I will not displease the Honorable Justice Brennan in the following reference, the State Appeals Court may have acted in conflict with this Court's recent opinion expressed in *Herbert* v. *Lando,* 99 S. Ct. 1635, 1648, n. 23, where the practice of bifurcating a trial by first resolving in "mini trial" one issue and then maybe another was rejected because it did "subject libel trials to...burdensome complications and intolerable delay", as it is happening unfairly in this case.

Even after all these eliminations the Appeals Court was not able to sustain its opinion of no negligence without further elimination of facts and affidavits and further damage to the principle of due process. As it could not say that Appellant had not shown Appellee's negligence or the inference of it, it came out from another angle with its opinion that "there was no want of due care on the part of the defendant" basing it on the story, narrated in the affidavit of the newspaper's photographer, that the photographer before taking the picture had secured permission and an announcement by an unemployment office official by the name of Gagnon.

Here the Appeals Court is already in conflict with the Supreme Court decision in *Sartor* v. *Arkansas National Gas Corp.,* 321 U.S. 620 (1944) where it was decided that "(t)his story is given by an interested and biased party and it is for the jury to see if it is believable.", and in *Roe* v. *Wade* 410 U.S. 113, where it was decided that "The trial court's...

making fact findings and rendering judgment for respondents, was a violation of Appellant's constitutional right to trial by jury" and "It was both reversible error and an act in excess of jurisdiction".

But, apart from that and more important to this Court, why did the State Appeals Court not mention at all the affidavit (A.C. 78-55 App. at 102) for the very respondent, where Gagnon himself, the very person who supposedly gave permission and announcement, says under oath that he does not recall either the photographer or having given the announcement for the taking of the picture which was right after used, one quarter of page big, to illustrate an article about all sort of wrong things happening in his very place of work? And, why did the court in its decision misrepresent that petitioner in affidavit said only that he did not hear the announcement, when it was very clear in that affidavit (A.C. 78-55 App. at 109 line 3) and it was also pointed out to the court in the brief that he *had denied* that that announcement was made? Why did it fail to consider the fact that when "(i)n Sept. 1974, a Globe weekend news editor selected from the Globe's library file the photograph which had first appeared in April 1973, he knew, as he said in affidavit, that it was old? And in the context of that editor's affidavit (Marois), which being by a biased person should have gone to the jury, see *Sartor* Supra, in light of *Herber* v. *Lando* (See Supra), of which the Appeals Court was aware, although only to cite it to the respondent's convenience, should not petitioner have been entitled to question the status of mind of the respondent and its employees to prove their negligence if the Appeals Court was not satisfied by what he had offered already, assuming that he had to deal with the court rather than the jury in that respect?

But the State Appeals Court could not bother with such things because it had finally set up the stage where it could say that "(o)n the uncontroverted facts developed from the pleadings and affidavits, therefore, there was no want of due care on the part of the defendant in taking and publishing the photograph which offended the plaintiff"

And so it wrote, but not before it eliminated the issues in

which Appellant contested both the propriety and the ways of the very summary judgment hearing, where the burden of showing the negligence had to be met. Appellant had raised the issue that the summary judgment Rule 56 cannot be interpreted so that one can come and move for summary judgment after three years of purposeful inactivity and for reasons and grounds available to him all the time. He had also raised the issue that respondent had come up with new and old matters by surprise and that that was not due process. He had also raised the issue that he had not been allowed to talk in his defense when that was needed to protect his interests and clarify things both for his counsel and the judge and that that was not due process. He had raised the issue that it was not giving equal protection the practice of using in court three different and unequally faithful methods of recording, of which to his detriment he had gotten the worst, and neither was the fact that the motion for a rehearing had been heard in chambers with no record being taken at all. All these and other issues the Appeals Court simply ignored.

What we are dealing with in this situation is hard to describe. But it seems clear that the State Appeals Court in disregarding issues questioning the very procedure where one is required to meet some decisive standards, did lack in due process. There is a right to be heard, and, in not taking up the Appellant's issues, the court did not want to hear him. That is constitutionally wrong, not only in the usual meaning of the 14th Amendment due process, but ironically of the 1st Amendment as well. For, what better or more effective way is there, to shut somebody up, than not to hear him?

Let us turn now to the question of conflict. It is true that in Massachusetts the standard for recovering for libel was declared by the Mass. Supreme Judicial Court to be a proof of negligence on the part of the publisher.

But considering the reviewing process used by the State Appeals Court, as it has been exposed above and as it can be varified by a study of the record available to the State Appeals Court, would or could one say that this is the practice used in any other jurisdiction in our land, including Massachusetts?

I may not be well qualified to answer that and I may have to leave the answer to this Court. And in the context of deciding that there was no negligence and of course doing it as a matter of law, in what jurisdiction, including Massachusetts, it is a matter of law, not whether one is required to exercise due care, but whether one actually exercises it; not whether one should foresee danger, but whether one could or did?

Where the trial judge just granted summary judgment without saying anything, and from the transcript, available to the Appeals Court, it is evident that negligence was not considered at all, neither as an issue nor as a requirement, and the judge talked only about some undefinable form of absolute priviledge, as the one that *Candid Camera* has, the Appeals Court, coming up in appeal with requirements of showing of negligence, regardless of the fact that it blinded itself not to see that they were met anyway, is clearly in conflict with the principle expressed in *Fountain* v. *Filson* 336 U.S. 681 (1949), where this Court said: "An appellate court on reversing a summary judgment for defendant may not, on the basis of depositions taken before trials, direct the trial court to enter judgment for the plaintiff on an issue not considered by the trial court".

Where the cumulative, practical effect of the ways in which reviews are handled by lower courts, federal or state's, is to deny what previous opinions of this court have meant, this case being only one blatant example, there is an impellent need for this Court to come in and check on the practice of such inferior courts to pretend, on one hand, to have a great concern for the rights of every individual and respect for this Court's decisions, and then proceed to effect the opposite, by means of every kind of expertise.

The State Appeals Court quotes our honorable Chief Justice of our Supreme Judicial Court and indirectly Justice Stewart of this Court saying that "The state's interest here resides in the individual's right to protection of his own good name, for this reflects no more than our basic concept of the essential dignity and worth of every human being...a concept at the root of any decent system of ordered liberty "*Stone* v. *Essex*

County Newspapers, Inc. 367 Mass., 849, 858 (1975); *Rosenblatt* v. *Baer* 383 U.S. 75, 92, (1966). At the same time, through all sort of machinations it sweats to reach and conclude that "1st Amendment freedoms require" to affirm a judgment that had been summarily granted against an innocent private citizen who had provenly been damaged by libel and by the invasion of its privacy.

But the 1st Amendment does not require that, as this Court has repeatedly said since Gertz, and in Gertz it was meant and expected that states would make it easier for private persons to recover, because they were more deserving, not harder, as the Mass. Appeals Court does, while pretending not to.

This Court needs to find out also whether in Massachusetts after Gertz the applied standard of negligence was raised from what it was eight years before, when in *Brawer* v. *Globe* 351 Mass. 53 (1966) the Mass. Supreme Judicial Court decided in an almost identical situation that the Globe had libeled the plaintiff, or, ironically whether the 1st Amendment allowed the state courts to practice in a way that was a de facto hindrance to the Appellant's effort to have his griviances examined.

The gravest and most tragic abuse by the State Appeals Court was the deciding that the trial judge did not need to disqualify himself. The attention of this Court here is asked not to be directed to the wrong finding in itself or alone, but to the fact that to reach it the State Court resorted, in the same style shown before in finding the lack of negligence, to the suppression of evidence and affidavits and the actual hiding and twisting of the applicable law.

Mass Supreme Judicial Court General Rule 3:25 Canon 3, C (1), See Appendix B3, in reflection of the Massachusetts Constitution right to free, independent and impartial judges, App. B3, says: "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including, *but not limited to,* instances where: (a)...(b)...(c)... (d)...

Confronted with the fact that the trial judge had actually worked with the respondent's counsel in a case concerning his own brother-in-law, and, although not mentioned, with the

suspicious circumstances in which both the counsel and his motion for summary judgment ended up in front of the judge, a situation in which it blatantly appeared that the judge's "impartiality might reasonably be questioned", the State Appeals Court, not only ignored, but outright hid the main body of the applicable rule, by purposefully misrepresenting that the only situations which required disqualification under Rule 3:25, Canon 3, C (1) were those narrowly examplified in the subsections a, b, c, and d. On top of that it felt obliged to change even the wording of subsection 3:25 Canon 3, C (1) (b) from "or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter" to "or a former associate served as a lawyer in the matter in controversy...", which served to obfuscate the fact that that very subsection could have after all required the disqualification, as the judge working involvement with respondent's counsel had lasted "from 1972 through 1974" as the latter confessed in open court in Supreme Judicial Court, see tape of S.J.C. 78-137. hearing, and the counsel started representing the respondent in this case in November, 1974.

Moreover the State Court found absurdly that the working relationship between judge and counsel had been revealed by counsel for respondent prior to summary judgement. Here again, in order to be able to assert that, the court suppressed the available affidavits by petitioner's two lawyers, who disproved such absurdity.

What happened to the 14th Amendment due process with such handling of the issue of disqualification by the State Appeals Court? What happens to the equal protection due to Appellant and to all in Massachusetts, and all over, if judges can preside in similar circumstances and on appeal the court acts as it has done in this case, and that is left to stand as a precedent?

This is not an issue that any state can consider or claim internal affair. This court has self evident jurisdiction and must use it, not for me, but for the principle that unbiased judges are at the base of the concept of equal protection, and that no decision or practice anywhere in this land can be allowed to

cheapen and destroy the value of courts, or any courts, in our land. Not two thousand years after *Cicero* in Rome could comfortably say: *"What sort of thing is the civil Law? It is of a sort that cannot be bent by influence or broken by power or spoiled by money"*.

CONCLUSION

"The right of jury trial is of ancient origin, characterized by Blackstone as "the glory of the English law" and the "most transcedent priviledge which any subject can enjoy. (Bk 3 p.379)." *Dimick* v. *Schiedt* 293 U.S. 474, 485.

Citing this same Dimick v. Scheidt at 486, this Court in *Beacon Theaters Inc.* v. *Westover* 359 U.S. 500, 501 "granted certiorari...because "Maintainance of the jury as fact finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." To add more to this, as my conclusion, I could not possible do, if this was a federal case, but it will certainly be argued that the above does not apply to our state case, as if our states were foreign to our land and culture, and, so, I need to address this Court a little longer.

I believe that the words cited above apply to our case and that this Court should give to the people, as apart from lawyers, who would normally come here, the opportunity to argue whether American citizens have been and are being denied by states the priviledge of having a jury trial, as guaranteed by the Seventh Amendment to our Constitution and strengthened by the XIV.

In a system where powerful groups start or join cases in order to lose them and, so, create precedents that erode and emasculate our Constitution and, when some are already advocating a new Constitutional Convention, I believe that the people needs desperately the direct protection of this Court, and to be heard even when it is compelled to come directly without lawyer representation. This Court should realize that it is very unlike that lawyers would in good faith bring here issues which militate against the very state courts, where they must win cases for their parties and to earn a living.

State courts themselves appear to be not so free and I, although knowing that it is the Massachusetts courts which I am here coming to issue with, rather than with my nominal adversary, have the feeling that, both in appeal and certiorari,

I came, not to say that my state's judges do not know what to do, but to ask this Court to free them to act as they are capable, so that we all, the courts, my adversary and I (and with me the people, that I, as well as I can, represent) can interact with dignity, that kind of dignity which our Constitution gave us and which this Court for us will defend and preserve.

Respectfully submitted,

by Angelo Cefalu,

the Appellant, pro se.

34 Avondale Street,
Dorchester, Mass. 02124
1-617-296-3222

December, 1979

APPENDIX A

THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.	SUPERIOR COURT CIVIL ACTION
ANGELO CEFALU	4835
V	
GLOBE NEWSPAPER COMPANY	

COMPLAINT

COUNT I:

1. The defendant in this action is the Globe Newspaper Co., which publish a newspaper called "The Boston Globe" with a substantial circulation, mostly in the greater Boston area.

2. The plaintiff is Angelo Cefalu, a very private person', who since 1969 has been receiving a social security disability pension on account of his total disability dating back to 1962, a situation which precludes him from applying or collecting unemployment insurance. Such disability was won by the plaintiff after seven bitter years of legal battle. A considerable and respectable segment of the Boston community knew of plaintiff's disability and that he could not qualify for unemployment insurance. This segment of the community including his family was also the only world with which the plaintiff was left to enjoy any contact in his misery and it was worth very much to him to know that in his limited world he was thought to be a very honest man.

3. A few days before April 23, 1973 a photograph was taken of a group of people lined up inside the Hurly unemployment building which included the unaware plaintiff who was there with a friend waiting to act as an interpreter for a friend who could not speak English and was getting a

check of a few hundred dollars. This sum was for benefits which had previously been denied and were now released partly because of the plaintiff's help in clarifying some previous misunderstanding. The friend's name is Francesco Sanfilippo and there must be records at the unemployment office to show that the plaintiff and Mr. Sanfilippo were involved in such clarification at that time.

4. On April 23, 1973 the defendant published the above mentioned photograph to illustrate an article with the title: "A COSTLY PARADOX: UNEMPLOYMENT IS HIGH, BUT JOBS GO BEGGING". Both article and picture are annexed hereto as exhibits. Among the persons in the photograph the plaintiff, appearing poorly dressed and highly recognizable, is just about the only one whose face is showing. The article both in the title and in the substance appears to be slanderous and defamatory of the Massachusetts unemployed in general and it seems to encourage readers to think of the persons in the photograph as cheaters, lazy or abusing the unemployment system. A reading of the article will convince anybody of that. For the plaintiff in particular this is more so, as, even without the help of the article, the publication of his likeness alone in such circumstances caused the readers who knew him well to inevitably think that he was a thief.

5. Although the defendant will claim that he was trying to deal with an issue of public interest and claim first amendment priviledge that should not obscure the essential fact that the showing of the plaintiff's face was neither needed nor of any importance to the presentation of the issue, and that such plaintiff's face easily could have and prudently should have been made unrecognizable. On the contrary the plaintiff for obvious reasons had every right to be left incognito. Therefore the publication constitutes an unreasonable invasion of privacy.

6. Such an invasion of privacy caused the plaintiff a lot

of damage to his reputation some of which is yet to come. For such sufferance the plaintiff asks judgment against the defendant and remuneration in the sum of 100,000 dollars.

COUNT II:

1. The plaintiff, as it was described in Count I, is since 1969 receiving a social security disability pension for his total disability dating back to 1962. A considerable and respectable segment of the Boston community knew of his disability, his pension and that he cannot possibly qualify for unemployment insurance. This respectable segment of the community also thought of the plaintiff as a very honest man and this good fame among his people was probably the only good thing left of what he once was.

2. A short time before April 23, 1973 the plaintiff was minding his own good business standing in line at the Hurley building in Boston, waiting to act as interpreter for a friend who was collecting an unemployment check, and he was completely unaware that a picture was being taken of the all line.

3. Such picture, although it was showing the plaintiff poorly dressed and highly recognizable, was recklesly published by the defendant on April 23, 1973 in its paper, the Boston Globe, to illustrate an article which both because of the title and the content should have warned him (the defendant) of the actual and potential defamation.

4. Because of the title and the content of the article the readers were led to think that the plaintiff and the other persons shown in the line were less than examplary citizens to say the least. Clear inference were made that they were cheating, being lazy or abusing the system. To the readers who knew the plaintiff and his circumstances the article and picture were saying that he was unmistakably a thief. They could not have though otherwise, as the plaintiff could painfully detect

in their voices and see in their eyes.

5. The publication proved to be libelous and slanderous for the plaintiff, as the incident story, which was falsely depicting him as a criminal, was widely circulated among the members of his community, with the inevitable damage to his reputation and the awful humiliation and anguish which he had to experience and bear in silence as he did not know what to do.

6. The defendant will certainly claim first amendment priviledge and invoke the New York Times v. Sullivan doctrine especially as it was extended to the Rosenblum v. Metromedia case and require that actual malice and reckless disregard be proved, but, although recklessness is easily detected, only fault needs to be shown in this case as in Gertz v. Welch, as the plaintiff is a private person uninvolved with and unimportant to the "public interest" matter dealt by the "Globe". Fault is self evident in the publication itself and in the ruthlessway it was done, for both of which the Globe Newspaper Company is responsible.

The plaintiff ask judgment against the defendant and remuneration for damage in the sum of 100,000.00 dollars.

APPENDIX B

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

MASS. R. CIV. P. RULE 56

SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessry, the court at the hearing of the motion, by examining the pleadings and

the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the

amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

MASS. DECLARATION OF RIGHTS
ARTICLE XXIX

It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every Citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the Supreme Judicial Court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws.

MASS. SUPREME JUDICIAL COURT
GENERAL RULE 3:25 CANON 3 C(1)

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) he knows that he, individually or as a fiduciary,

or his spouse or minor child residing in his household, has a financial or other property interest in the subject matter in controversy or in a party to the proceeding, which interest could be substantially affected by the outcome of the proceedings;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

United States Constitution

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assembly, and to petition the Government for a rederess of grievances.

SEVENTH AMENDMENT

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

NINTH AMENDMENT

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law shich shall abridge the privileges or immnities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
NO. 4385

ANGELO G. CEFALU
v.
THE GLOBE NEWSPAPER CO.

MEMORANDUM AND ORDER

The plaintiff commenced this action *pro se* against the Globe Newspaper Company on or about February 6, 1975. The plaintiff's claim for relief arises from a publication in the Globe on April 23, 1973 over a caption reading: "A few of the 185,000 persons out of work in Massachusetts line up at the Unemployment Office at the Hurley Building in Government Center". The plaintiff alleges that he was one of the recognizable individuals standing in that line, and because of his Social Security status, it could have been illegal for him to collect Unemployment Compensation.

The defendant Globe filed a motion to dismiss for failure to state a claim upon which relief could be granted, pursuant to Mass. R. Civ. P. 12(b)(6), and motion to dismiss because of the pendency of a prior action in the courts of the Commonwealth. This later motion was brought pursuant to Rule 12(b)(9). The alleged prior action was filed on or about November 6, 1974 in Suffolk Superior Court and is presently pending as Docket No. 2647.

Under the so-called New Massachusetts Rules of Civil Procedure, the plaintiff need set forth "a short and plain statement of the claim showing that the pleader is entitled to reflief. . . ." Rule 8(a)(1). The averments of this case do not involve the special matters set forth in Rule 9(b), and are not required to be pleaded with particularity. Unlike former practice where inferences in pleadings were construed strictly against the pleader, current practice allows all reasonable

inferences of a claim in favor of the pleader, *Charbonnier, et al.* v. *Amico* 75 Adv. Sh. 653.

There is no question that the drafting of this complaint is consistent in style and clarity with a *pro se* action. Nonetheless, the general averments are clear enough. Whether the plaintiff can produce the necessary proof as to all the technical elements of his claim is not for the court to decide at this time and on this motion.

In most instances of this kind, judicial action dismissing claims will more appropriately follow a period of discovery. At such time a Motion for Summary Judgment may conceivably be appropriate.

Inasmuch as the effect of this court's ruling is to keep alive the plaintiff's action, it is appropriate to turn to the defendant's other basis for relief. It appears that the subject of this suit may well be already the subject of another action in this very court. See Suffolk Docket No. 2647. For that reason, this case will be consolidated with that action, pursuant to the provision of Rule 42(a).

Should it later be determined that the actions are indeed separate, or that administrative problems are created by the consolidation, another justice of this court can act to sever under the provisions of Rule 42(b).

The motion to dismiss is therefore denied, and this action will be consolidated with Suffolk Docket No. 2647.

John Paul Sullivan
Justice of the Superior Court

Entered:
Nov. 24, 1975

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
CIVIL ACTION NOS.
2647 and 4385

ANGELO CEFALU

VS.

GLOBE NEWSPAPER COMPANY

ORDER

Motion for Summary Judgment to be heard by DeGugliemo, J., Friday, September 23, 1977 at 10:00 a.m., Room 227. After hearing, cases are to be returned to the Assignment Session for immediate jury trial.

By the Court, (Nelson, Jr.)

Michael Sclafani
Assistant Clerk

Entered: September 20, 1977

APPENDIX E

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPER COURT
CIVIL ACTION
No. 2647
4385

Angelo Cefalu PLAINTIFF(S)
V.
Globe Newspaper Company DEFENDANT(S)

JUDGMENT

(SUMMARY)

(PURSUANT TO MASS. R. CIV. P. 56)

This action came on to be heard before the court, *DeGuglielmo* J., presiding, upon motion of the Defendant(s) _____ for summary judgment pursuant to Mass. R. Civ. P. 56 — the parties having been heard — and the Court having considered the Pleadings — Admissions — and Affidavits, finds there is no genuine issue as to material fact and that the *Defendant* is entitled to a judgment as a matter of law, it is ordered and adjuged that:

Judgment be entered for the defendant on all counts on Case No. 2647. Plaintiff in open court discontinued all claims arising out of Case No. 4385 which was consolidated herewith.

Dated at Boston, Massachusetts, this 23rd day of September 1977.

For of Judgment Approved:

Joseph DeGuglielmo
Associate Justice of
the Superior Court

Michael Joseph Donovan,
Clerk of Court

By: *Mary J. Gaguin*
Assistant Clerk

APPENDIX F

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
4385, 2647

ANTHONY CEFALU[1]

V.

GLOBE NEWSPAPER COMPANY

ACTION ON PLAINTIFF'S MOTION FOR RE-HEARING

This matter came on to be heard before me on the plaintiffs motions for re-hearing. After argument and full consideration of statements made by both the counsel for the plaintiff and the plaintiff, I deny the motions for re-hearing on the ground that there is no legal basis for them.

Joseph A. DeGuglielmo, Justice

December 13, 1977

[1]Typographical error, name should read Angelo Cefalu

APPENDIX G

IN THE MASSACHUSETTS APPEALS COURT

ANGELO CEFALU *vs.* GLOBE NEWSPAPER COMPANY
(and a companion case between the same parties).

Suffolk. April 12, 1979. - July 11, 1979.
Present: Brown, Perretta, & Kass, JJ.

Practice, Civil, Summary judgment. *Libel and Slander. Privacy. Judge.*

Two civil actions commenced in the Superior Court on November 4, 1974, and January 23, 1975, respectively.

Motions for summary judgment where heard by *DeGuglielmo, J., a judge of the Municipal Court of the City of Boston sitting under statutory authority.*

Angelo Cefalu, pro se.
James F. Mchugh for the defendant

KASS, J. In connection with stories which it published on April 23, 1973, and on September 29, 1974, The Boston Globe twice published a photograph of persons lined up to collect unemployment benefits at the Hurley Building.[1] That picture included the plaintiff Cefalu, who complains of libel and invasion of privacy.[2] Summary judgments were entered

[1]The Hurley Building is the main office in Boston of the State Division of Employment Security.

[2]The plaintiff has brought two actions. The first complaint was filed November 4, 1974, and, in the first instance, was based only on the second publication. That complaint was twice amended and ultimately referred to both publications, as well as adding a count for invasion of privacy. A second action was filed by Cefalu pro se on January 23, 1975, alleging fundamentally the same grievances as the first complaint. At the time of argument on the motion for summary judgment, the second complaint was withdrawn in open court. On appeal, Cefalu challenges the lawfulness of the dismissal for redundancy of the second action, which was Suffolk Superior Court No. 4385. On the view we take of the case, the propriety of the disposition of No. 4385 is academic because the entry of summary judgment in the first case, No. 2647, disposes of both cases on the merits.

in favor of the defendant and from these judgments Cefalu has appealed. We think no libel or invasion of privacy occurred and affirm the judgments.

We draw the basic facts from the pleadings and the affidavits filed in support of and opposition to summary judgment. Charles Dixon, a Globe photographer, received an assignment from the photo control desk to make a picture of people standing in line to collect unemployment compensation. He went to the Hurley Building and introduced himself by name, affiliation, and purpose to a security guard. That led Dixon to Lucien R. Gagnon, Chief supervisor of information of the Division of Employment Security. Gagnon made an announcement that a Globe photographer would take a picture of the line from the rear and that anyone who chose not to be photographed could turn his or her back or step out of line momentarily. Several persons did in fact turn their backs. The plaintiff's visage is one of the few in the crowd which offers a recognizable profile. Cefalu did not hear the announcement.

The April, 1973, publication of the picture accompanied one of a series of articles about the Massachusetts economy and the installment in question was headlined: "A costly paradox: unemloyment is high, but jobs go begging." The photograph itself ran with the caption: "A few of the 185,000 persons out of work in Massachusetts line up at the unemployment office at the Hurley Building in Government Center." Cefalu's presence in the queue, however, was not to collect a check on his own behalf but to act as a translator for a non-English speaking friend who was, indeed, picking up a check. On the occasion of the first publication, Cefalu seems not to have been discomfited, voiced no objection to it to the Globe and, indeed, displayed the photograph at his home. In September, 1974, a Globe weekend news editor, laying out a feature story on unemployment in Massachusetts, selected from the Globe's library file the photograph which had first appeared in April, 1973, and ran the picture again, in much smaller format, with the caption: "Jobless line up for their checks at Division of Employment Security office." Neither publication identified the plaintiff.

1. Since the case comes to us on entry of summary judgment, we must examine the pleadings and affidavits to determine whether they reveal the absence of any dispute over material facts, which would entitle the defendant to the entry of judgment. *Community Natl. Bank* v. *Dawes,* 369 Mass. 550, 553-556 (1976). Smith & Zobel, Rules Practice § 56.8 (1977). 6 Moore's Federal Practice § 56.04(1) (2d ed. 1976). In the area of defamation, summary judgment procedures have been described as particularly appropriate because "the stake here...is free debate...The threat of being put to the defense of a law suit...may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." *Washington Post Co.* v. *Keogh,* 365 F.2d 965, 968 (D.C. Cir. 1966), cert, denied, 385 U.S. 1011 (1967). See *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29, 52-53 (1971); *Time, Inc.* v. *McLaney,* 406 F2d 565, 566 (5th Cir. 1969), cert. denied, 395 U.S. 922 (1969); *Roketenetz* v. *Woburn Daily Times, Inc.,* 1 Mass. App. Ct. 156, 163-164 n.5 (1973). Thus, "where it is unlikely that the plaintiff will succeed on the merits of his claim, courts have been more willing, within the area of libel than elsewhere, to grant summary judgment." *Herbert* v. *Lando,* 568, F.2d 974 n.16 (2d Cir. 1977) rev'd on other grounds, U.S. [1979].[a] But see *Hutchinson* v. *Proxmire,* U.S., n.9 (1979),[b] in which the Supreme Court expresses doubt, without deciding, as to the particular utility of summary judgment in libel cases where "actual malice" is the subject of inquiry.

2. Quite obviously the subject matter of the articles which the photograph embellished, unemployment in Massachusetts, was a subject of public interest. Even if we assume, therefore, that the picutre and the context in which it ran made a false and damaging statement[3] about the plaintiff, the

[a]99 S.Ct. 1635.

[b]47 U.S.L.W. 4827 (June 26, 1979).

[3]We do not reach in this opinion whether the photographs were defamatory so far as Cefalu is concerned. If the picture is to be read merely as saying of Cefalu that he was unemployed, it is not likely that this is actionable. See *Sousa* v. *Davenport,* 3 Mass. App. Ct. 715 (1975). Presumably the plaintiff finds obloquy by association with aspects of the text of the articles which the photograph illustrated.

defendant newspaper enjoys a privilege which the plaintiff can penetrate only if the photograph was published with "malice" in the constitutional sense, i.e., reckless disregard of whether the allegations were true or not, in the case of a public person, *New York Time Co.* v. *Sullivan,* 376 U.S. 254, 279-280 (1964), and negligence as to the facts in the case of a private person. *Stone* v. *Essex County Newspapers,* 367 Mass. 849, 858 (1975). The *New York Times* decision dealt with the circumstances under which a public official might recover damages for a defamatory falsehood. Three years later, a majority of the Supreme Court extended the constitutional privilege to defamatory criticism of public figures. *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 154-155 (1967). It was in *Rosenbloom* v. *Metromedia,* 403 U.S. 29 (1971), that the Supreme Court considered whether the *New York Times* privilege should extend to defamatory falsehoods relating to private persons, if the statements concerned matters of general or public interest. Perhaps because it was so badly divided in *Rosenbloom* v. *Metromedia, Inc.,* the Supreme Court subsequently considered in *Gertz* v. Robert Welch, Inc., 418 U.S. 323 (1974), the question of the extent of the immunity of the press (whether print or electronic) from liability for defamation to private persons. In that case the court took note (at 342) of society's interest in assuring to the freedoms of speech and press that "breathing space' essential to their fruitful exercise," while recognizing also (at 340) that "[n]either the intentional lie nor the careless error materially advance society's interest in 'uninhibited, robust, and wide-open' debate on public issues." The upshot of the *Gertz* decision was that the States could "define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.* at 347. This our Supreme Judicial Court did in *Stone* v. *Essex County Newspapers, Inc.,* 367 Mass. 849, 851 (1975), holding that private persons, as distinguished from public officials and public figures, may recover compensation on proof of *negligent* publication of a defamatory falsehood. "The State's interest here," Justice Hennessey wrote for the court, "resides in the private individual's right

to the protection of his own good name, for this 'reflects no more than our basic concept of the essential dignity and worth of every human being — a concept at the root of any decent system of ordered liberty.' *Rosenblatt* v. *Baer,* 383 U.S. 75, 92 (1966) (Stewart, J., concurring)." *Id.* at 858.

In testing for negligence, we bear in mind that *Gertz* and, by derivation, *Stone* require that the substance of the material claimed to be defamatory must make substantial danger to reputation apparent. That is, civil liability should not rest on a factual misstatement the content of which did not warn a reasonably prudent editor or broadcaster of its defamatory potential. *Gertz* v. *Robert Welch, Inc.* 418 U.S. at 348. See concurring opinion of Mr. Justice Powell and Mr. Justice Stewart in *Time, Inc.* v. *Firestone,* 424 U.S. 448, 464-465 (1976). In the instant case, involving a subject, as we have noted, of public interest, there was no reason for an editor to suppose that the persons lined up at a desk to receive unemployment payments were there for any purpose other than that which one might expect would place them at such a scene. The photographer, Dixon, was conscientious in ascertaining that the line in question was for such a purpose.[4] Short of the extraordinary step of interviewing each person in the moving line, there were no means for either Dixon or his editors to divine or guess at the plaintiff's unusual reason for being in the public place in which he was photographed. Nor did the articles pertain to a particular face in the crowd, let alone the plaintiffs's. Compare *Brauer* v. *Globe Newspaper Co.,* 351 Mass. 53, 56 (1966). To hold a publication liable on these facts would be to demand a standard of such meticulous care as would induce undue self-censorship by the news media. The very speed with which news goes to press or on the air must allow for margins of error in detail and nuance

[4]We do not thing anything turns on the only factual issue on which the parties' affidavits are inconsistent, although not in conflict. The Globe's affidavits say Gagnon made an announcement that the photograph would be taken and Cefalu's affidavits say that neither he nor the person for whom he was acting as a translator heard the announcement. On our view of the case, the Globe was privileged to make and publish the picture without any prior announcement.

that fall short of intentional falsehood or careless error. "Some degree of abuse," James Madison wrote in the Report on the Virginia Resolutions of 1798, "is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press."[5]

On the *uncontroverted* facts developed from the pleadings and affidavits, therefore, there was not a want of due care on the part of the defendant newspaper in taking and publishing the photograph which offended the plaintiff.

3. As to the invasion of Cefalu's privacy by publication of the photograph, it is well to bear in mind that the establishment of the right of privacy in this Commonwealth has a statutory basis of relatively recent origin. G. L. c. 214, § 1B, as inserted by St. 1973, c. 941. This provides, in relevant part, "A person shall have a right against unreasonable substantial or serious interference with his privacy." Whatever conduct may rise to a violation of this statute, the publication of the photograph of a line of people in a government building is not it. The notion of right of privacy is founded on the idea that individuals may hold close certain manuscripts, private letters, family photographs, or private conduct which is no business of the public and the publicizing of which is, therefore, offensive. The appearance of a person in a public place necessarily involves doffing the cloak of privacy which the law protects. See *Themo* v. *New England Newspaper Publishing Co.,* 306 Mass. 54, 58 (1940), in which the court said, "The counts in question stated no case unless the plaintiffs under all conceivable circumstances had an absolute legal right to exclude from a newspaper any photograph of them taken without their permision. If every person has such a right, no newspaper could lawfully publish a photograph of a parade or a street scene." See also *Broderick* v. *Police Commr. of Boston,* 368 Mass. 33, 44 (1975), cert. denied, 423 U.S. 1048 (1976); *Hastings & Sons Publishing Co.* v. *City Treasurer of Lynn,* Mass. , (1978).[c] An extensive discussion of the principles of invasion of privacy appears in Restatement (Second) of Torts §§ 652A-652I (1976). The Restatement distinguishes between publication of a picture taken on a public street (not an invasion of privacy) and a picture taken in a private place (which would be an invasion of privacy). § 652D, Comment b.

[5]As quoted in *Gertz* v. Robert Welch, Inc., 418 U.S. at 340.

[c]Mass. Sh. (1978) 920, 929.

4. The plaintiff urges that the judge who heard argument on the motion for summary judgment and who entered summary judgment should have disqualified himself for the reason that he had at one time participated in conferences with the law firm of Bingham, Dana & Gould when it represented a relative of the judge in an unrelated civil action. That firm is counsel to the Globe Newspaper Company. The criteria governing disqualification appear in Canon 3C of the Code of Judicial Conduct, S.J.C. Rule 3:25, 359 Mass. 844-845 (1972). Under Canon 3C a judge should disqualify himself if "he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings." Canon 3C(1) (a). He must also disqualify himself if he or a former associate has "served as lawyer in the matter in controversy...or the judge...has been a material witness concerning it." Canon 3C(1) (b). Other provisions requiring disqualification refer to direct or indirect financial interest. The presiding judge was not encumbered by any of those disqualifications. We do not think that this indirect experience with the defendant's law firm some years previously would reasonably call into question his ability to act impartially on the matter before him. Moreover, the fact and nature of the prior contact between the motion judge and counsel for the defendant had been voluntarily disclosed by counsel for the defendant to the plaintiff's attorney on the twentieth or twenty-first of September, 1977, in ample time for the plaintiff's attorney to raise any objections on this score at the summary judgment hearing on September 23. The complaint concerning the motion judge's impartiality was made only after the plaintiff learned that the defendant's motion for summary judgment had been allowed.

5. The plaintiff also objects that inadequate notice of the summary judgment hearing was given by the defendant. It is sufficient to observe that plaintiff's counsel made no objec-

tion on this score on September 20 when the judge sitting in the assignment session ordered the motions for summary judgment to be heard on September 23, 1977.

The plaintiff has presented his case on appeal pro se and has done so creditably. A theme pervades his briefs that anything less than the full panoply of a jury trial denies him due process. This is an untrained view of due process of law. A just concern for the rights of the parties[6] and First Amendment freedoms requires that this case be closed at that stage where uncontroverted facts preclude a cause of action.

Judgments affirmed.

[6]The defendant has argued that the appeal should be dismissed because not timely docketed in this court. We have examined the record carefully and find insufficiently clear and compelling bases for so doing.

APPENDIX H

Notice of Denial of Further Appellate Review
As Received by Appellant

COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court for the Commonwealth,
At Boston, September 28, 1979

ORDER

It is hereby Ordered, that the following Application for Further Appellate Review be denied:

M-1290 ANGELO CEFALU
V.
GLOBE NEWSPAPER COMPANY
(and a companion case between the same parties)
(Suffolk Superior Nos. 2647 and 4385; A.C. Nos. 78-55 and 78-306)
(Motion to File Opposition Late — Allowed)

By the Court,
Patrick J. Hurley, Assistant Clerk

September 28, 1979

As Apperaing In The 1979 Mass. Adv. Sh. 2415

SUPREME JUDICIAL COURT OF MASSACHUSETTS
AND
THE APPEALS COURT
2415

ORDERS

The Supreme Judicial Court has made the following orders with respect to applications for leave to obtain further appellate review:

September 25, 1979

Denied:

Angelo Cefalu vs. *Globe Newspaper Company* (and a companion case). Reported below: Mass. App. Ct. Adv. Sh. (1979) 1437.

FRIDAY, OCTOBER 5, 1979
VOL. 6 NO. 40
Officially Published Every Friday by Massachusetts Lawyers Weekly
30 Court Square Boston, Mass. 02108 Telephone 227-6034
Subscriptions are $50 per year
Second Class Postage Paid at Boston, Mass.

APPENDIX I

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. 78-51

ANGELO CEFALU

vs.

GLOBE NEWSPAPER COMPANY

JUDGMENT

This case came on for hearing, Braucher, J. presiding, and the issues having been duly heard,

It is ORDERED and ADJUDGED,

that the within petition brought under G.L.c.211, s.3 be dismissed.

Dated at Boston, Massachusetts, this ninth day of March, 1978.

Jean M. Kennett
Asst Clerk of Court

APPENDIX J

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss SUPERIOR COURT
CIVIL ACTION #4385

ANGELO CEFALU

v.

GLOBE NEWSPAPER CO.

This matter came on to be heard before me upon the plaintiff's motion that the court disqualify itself. After hearing thereof, with all parties represented, I find as a fact that the motion as submitted has no merit, either in law or in fact, and was frivolously brought by the plaintiff who could produce no evidence which would warrant even the suggestion of disqualification. I therefore deny the motion and assess costs in the amount of $250.00.

DeGuglielmo

March 298, 1978

APPENDIX K

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. 78-137 CIV

ANGELO CEFALU

vs.

GLOBE NEWSPAPER COMPANY

JUDGMENT

This case came on for hearing before the Court, Kaplan, J. presiding, and was argued* by counsel and the issues having been duly heard,

It is ORDERED and ADJUDGED,

that the petition for relief under G. L. c. 211, §3, be, and the same is hereby denied, without prejudice to the petitioner's pending appeal.

Dated at Boston, Massachusetts, this fifth day of June, 1978.

John E. Powers
Clerk of Court

*Plaintiff argued *pro se*.

APPENDIX L

In The Massachusetts Supreme Judicial Court
For The Commonwealth
48
ANGELO CEFALU vs. GLOBE NEWSPAPER COMPANY
MASS 1519[1]

January 4, 1979.

Absent an abuse of discretion, there is no error in denying a petition under G. L. c. 211, § 3. In his brief the plaintiff states, "If my appeal had to based on an abuse of discretion, I do not think that I could mount one, because I cannot bring myself to think that the ...[single justice's] decision, here appealed, constitutes an abuse of discretion." We agree with the plaintiff that the denial of his petition was not an abuse of discretion.

We have, nonetheless, examined the records before the Appeals Court. All the issues raised by the plaintiff before us are presently pending in that court. We think, therefore, the plaintiff's substantive rights are protected through the normal appellate process.

However, in our review it appeared that there is no appeal presently pending from an assessment of two hundred and fifty dollars costs on March 29, 1978. We think the plaintiff is entitled to bring new proceedings in the county court to determine the correctness of that assessment. The plaintiff should serve the Attorney General instead of the present defendant in his new petition.

The denial of the petition is affirmed with leave to file a new petition as described herein.

So ordered.

Angelo Cefalu, pro se.
James F. McHugh for the defendant.

[1]West Company in 384 N.E. No. 3 Feb. 28, 1979, Massachusetts Edition at page 1217, misleadingly prefaced the above by saying: "Petition for Superintendence of inferior Courts was denied by *Superior Court, Suffolk County,* and plaintiff appealed. The Supreme Judicial Court held that absent an abuse of discretion, there is no error in denying a petition under statute authorizing superintendence of inferior Courts to correct and prevent errors.

APPENDIX M

THE COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

February 2, 1979

Mr. Angelo Cefalu
34 Avondale Street
Dorchester, Massachusetts 02124

Dear Mr. Cefalu:

Re: *Angelo Cefalu v. Globe Newspaper Company*
Supreme Judicial Court No. SJC-1519

Your petition for a Rehearing in re the above captioned case has been considered by the court and is denied.

Very truly yours,

William M. Cloran
Asst. Clerk

APPENDIX N

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

NO. 79-46 CIVIL

ANGELO CEFALU

vs.

GLOBE NEWSPAPER COMPANY

ORDER

This matter came on for hearing before the Court, and was argued by Angelo Cefalu, pro se, and by counsel for the Attorney General's Office; and thereupon, in accordance with the Memorandum of Decision entered on June 4, 1979, it is ordered that in the case of *Cefalu* v. *The Globe Newspaper Company,* Suffolk Superior Court Docket No. 4385 CIV, the Order entered on March 29, 1978 assessing $250 costs upon the plaintiff be set aside and the same is hereby vacated.

By the Court, (Liacos, J.)

John E. Powers
Clerk

Entered: June 4, 1979

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT
NO. 79-46 CIV

ANGELO CEFALU

vs.

GLOBE NEWSPAPER COMPANY

MEMORANDUM OF DECISION

This matter came on to be heard before me as Single Justice on a complaint filed by Mr. Cefalu acting pro se. The Commonwealth filed a Motion to Dismiss which has not been acted upon. Additionally, the Commonwealth filed a Motion to Withdraw the Motion to Dismiss and for Leave to File Answer. The latter motion of the Commonwealth gives recognition to the fact that the plaintiff was entitled to file his complaint under G. L. c. 211, § 3. Although the plaintiff does not characterize his complaint as a petition under G. L. c. 211, § 3, the Commonwealth correctly recognizes it to be such, as does the Court.

Part of the background of this matter is reflected in a rescript opinion by the Full Court issued on January 4, 1979. See *Cefalu* v. *Globe Newspaper Co.,* 1979 Mass. A.S. 49. In that opinion the Court gave leave to the plaintiff to file a petition under G. L. c. 211. § 3 to raise the issue of the propriety of the assessment of $250 costs by the Trial Judge who acted adversely to the plaintiff's motion that the Judge disqualify himself in the proceeding then pending in the Superior Court between the plaintiff and the Globe Newspaper Company. In the present complaint, the plaintiff seeks to have that order of assessment of costs set aside. The Commonwealth's "Motion to Withdraw" and the Answer accompanying it indicate that the Commonwealth agrees to waive the assessment of

costs. In light of such a waiver, and on the basis of the information placed before me, I rule that the assessment of costs in the amount of $250 by the Trial Judge on plaintiff was improper and that such order is to be set aside and vacated.

The plaintiff also complains of alleged impropriety in the way the motion to disqualify the Trial Judge was heard. It is my understanding that the matter is pending on appeal before the Appeals Court and, therefore, I do not reach it. Additionally, plaintiff complains that he has been harassed by certain unnamed personnel in the Superior Court, and that he has not been given courteous and fair treatment in dealing with various clerks and administrative personnel in the pursuit of his claims and in the preparation of his appeal. Plaintiff fails to identify the persons allegedly interfering with his rights or to indicate in what way such interference has taken place.

The plaintiff has every right to represent himself pro se, both at the trial level, and at the appellate level. He is entitled to courteous and cooperative treatment from all administrative and clerical personnel as is any citizen. Since I have no evidence on this issue adequate to make a finding, I do not reach it; however, I trust that the plaintiff will be fairly treated in regard to obtaining reasonable access to the papers and records in the court, as well as in all other matters necessary to present his claims or argue his appeals.

The Motion to Withdraw the Motion to Dismiss and for Leave to File Answer is allowed. An order is to issue to the Superior Court in the case of *Cefalu* v. *The Globe Newspaper Company,* Suffolk Superior Court Docket No. 4385 CIV, setting aside and vacating the Order assessing $250 costs upon the plaintiff.

Paul J. Liacos
Associate Justice

June 4, 1979

APPENDIX O

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. — APPEAL COURT
78-55 & 78-306

ANGELO CEFALU — SUPERIOR COURT
V. — Nos. 2647 & 4385
GLOBE NEWSPAPER COMPANY

SUPREME JUDICIAL COURT
78-51, 78-137 & 79-46

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH
No. 1519

AFFIDAVIT OF SERVICE

I, Angelo Cefalu, having been duly sworn, under oath declare that on Nov. 30, 1979 served attorney James F. McHugh Esq., counsel for the Globe Newspaper Company, a copy of the Notice of Appeal and Petition for a writ of certiorari in the Supreme Court of the United States, filed in the Massachusetts Suffolk County Appeals Court, Suffolk County Superior Court, Supreme Judicial Court for Suffolk County and Supreme Judicial Court for the Commonwealth and containing a request for certification of record possessed by the respective courts, by delivering such copy by hand to a clerk receptionist at his office, at 100 Federal Street, Boston, Mass.

Angelo Cefalu
34 Avondale Street
Dorchester, Mass. 02124
296-3222

SUBSCRIBED AND SWORN TO
before me this fifth day
of December, 1979.
MARGARET M. WATERS
NOTARY PUBLIC
My Commission Expires: June 4, 1982

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. — APPEAL COURT
78-55 & 78-306 cons.

ANGELO CEFALU
Plaintiff-Appellant — SUPERIOR COURT
Nos. 2647 & 4385

V. — SUPREME JUDICIAL COURT
78-51, 78-137 & 79-46

GLOBE NEWSPAPER COMPANY
Defendant-Appellee — SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH
No. 1519

NOTICE
OF APPEAL AND PETITION
FOR A WRIT OF CERTIORARI
IN THE UNITED STATES SUPREME COURT

Notice is hereby given that I, Angelo Cefalu, acting pro se and pursuantly to 28 U.S.C. 1257 (2), appeal to the United States Supreme Court from a decision which the Massachusetts Appeals Court issued in the above captioned appeals, on July 11, 1979, affirming a summary judgment of the Massachusetts Superior Court, and which the Supreme Judicial Court of Massachusetts, stating no reason, declined to review on Sept. 28, 1979.

The appeal will be combined to a petition for a writ of certiorari, pursuant to 28 U.S.C. 1257 (3), to the Massachusetts Appeals Court whether its reviewing process was consistent with the provision of the U.S. Constitution, the relevant decisions of the United States Supreme Court and the practice in all other jurisdictions in the nation. The appeal refers to that

part of the decision which upheld the challenged constitutionality of Mass. R. Civ. Proc. Rule 56, and its question is: Whether in cases of libel and invasion of privacy where a jury trial was demanded and never waived and, five days before assignment for jury trial, appellee moved for summary judgment and the assignment session judge ordered cases to be heard in summary judgment under state accepted Rule of Civil Procedure 56, but with direction that "(a)fter hearing, cases are to be returned to assignment session for immediate jury trial", and, on hearing, summary hudgment was granted for the appellee, the application of Rule 56 with such finality denied the Appellant the right to a jury trial, which in cases like the instant one is conferred as a priviledge to him, as to all Americans, by the VII Amendment to our Constitution and which no state can abridge, by force of the XIV Amendment to our Constitution which in pertinent says that "...No state shall enact or enforce laws which abridge the priviledges and immunities of United States citizens".

The clerk of this appeals court as the clerks of the other courts in which this litigation has been handled will please certify all records possessed by them and pertaining to this litigation and provide for its eventual transmission to the Supreme Court of the United States, pursuantly to the 12th and 21st rules of that Court.

Angelo Cefalu. *pro se.*

34 Avondale Street
Dorchester Mass. 02124
1-617-296-3222

Supreme Court, U. S.
FILED
JAN 18 1980
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-971.

ANGELO CEFALU,
APPELLANT AND PETITIONER,

v.

GLOBE NEWSPAPER COMPANY,
APPELLEE AND RESPONDENT.

APPEAL FROM AND PETITION FOR A WRIT OF CERTIORARI
TO THE APPEALS COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS.

Motion to Dismiss
and
Brief in Opposition to Petition for a Writ of Certiorari.

JAMES F. MCHUGH,
BINGHAM, DANA & GOULD,
100 Federal Street,
Boston, Massachusetts 02110.
Attorney for the Appellee-Respondent.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-971.

ANGELO CEFALU,
APPELLANT AND PETITIONER,

v.

GLOBE NEWSPAPER COMPANY,
APPELLEE AND RESPONDENT.

APPEAL FROM AND PETITION FOR A WRIT OF CERTIORARI
TO THE APPEALS COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS.

Motion to Dismiss
and
Brief in Opposition to Petition for a Writ of Certiorari.

The respondent moves that this Court dismiss the present appeal on the ground that it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to need further argument. In addition, respondent respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the judgment of the Appeals

Court for the Commonwealth of Massachusetts in this case. The relevant opinion is reported at Mass. App. Ct. Adv. Sh. (1979) 1437, 391 N.E. 2d 935.[1]

I. The State Rule Involved, the Questions Presented, and the Nature of the Case.

A. The Rule.

The appeal sought by petitioner raises a question concerning the validity of a Massachusetts rule of civil procedure governing summary judgment. The Massachusetts Rules of Civil Procedure, effective July 1, 1974, are modeled after the Federal Rules of Civil Procedure. The rule in question, Mass. R. Civ. P. 56, deals with summary judgment and, in all material respects, is identical to the cognate federal rule, Fed. R. Civ. P. 56. Petitioner contends that the Massachusetts rule, on its face and as applied, violated his right to a trial by jury, a right which he contends is conferred on all citizens of the United States by the Seventh Amendment to the Constitution of the United States and which the states are disabled from denying by virtue of the "privileges and immunities" clause of the Fourteenth Amendment to the Constitution.

---

[1] Petitioner has filed with this Court a combined jurisdictional statement and petition for a writ of certiorari. Given his pursuit of an appeal, it is not clear that it was necessary for him to file a petition for a writ of certiorari. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 487 n.14 (1975); *Flournoy* v. *Wiener*, 321 U.S. 253, 263 (1944); 28 U.S.C. § 2103. Nevertheless, the route that the petitioner in fact has taken appears permissible. *Columbus & Greenville Ry. Co.* v. *Miller*, 283 U.S. 96, 98 (1931). Accordingly, the material which follows will deal both with petitioner's jurisdictional statement and with his petition for a writ of certiorari.

B. Questions Presented for Review by Certiorari.

Petitioner presents for review by way of certiorari three sets of alleged facts which he contends coalesce into three discrete questions for review. The first question, while difficult to understand fully, appears to be whether he was denied due process and equal protection of the law under the Fourteenth Amendment to the Constitution and whether the "privileges and immunities" described in that amendment were infringed by the Appeals Court for the Commonwealth of Massachusetts because of the manner in which that court articulated its view of the law and facts governing petitioner's appeal from allowance of respondent's motion for summary judgment in the trial court.

The second question appears to be whether, in effect, the "cumulative handling of this case by the Massachusetts courts at all levels" conferred on the press an absolute immunity from actions for defamation and invasion of privacy and thus allegedly violated rights guaranteed to petitioner under the First, Ninth, and Fourteenth Amendments to the Constitution.

The third question is whether the manner in which the Appeals Court for the Commonwealth of Massachusetts resolved petitioner's contention that the trial judge should have disqualified himself, *sua sponte*, from hearing respondent's motion for summary judgment violated petitioner's right to due process and equal protection of the law under the Fourteenth Amendment to the Constitution of the United States and infringed upon the "privileges and immunities" described in the same amendment.

C. The Proceedings Below.

The proceedings below, in their full glory, are lengthy and extremely complicated. Reduced to essentials, however, in

connection with articles which it published on April 23, 1973, and on September 29, 1974, respondent published a photograph of persons lined up to collect unemployment benefits at the main office of the Commonwealth's Division of Employment Security in Boston, Massachusetts. That photograph included the visage of petitioner who was standing in the line, not to collect benefits himself, but to help a friend collect them. As a result, petitioner filed an action for libel and invasion of privacy. Summary judgment on his claims was entered in favor of respondent and petitioner appealed to the Commonwealth's intermediate appellate court, the Appeals Court. In an opinion entered July 9, 1979, and reported at Mass. App. Ct. Adv. Sh. (1979) 1437, 391 N.E. 2d 935, that court affirmed the judgment of the trial court. Insofar as petitioner's action concerned libel, the Appeals Court declined to reach the question whether the photograph, in the company of the surrounding text, was defamatory. Instead, it held that, whether or not defamation had occurred, respondent had not been guilty of negligence.[2] With respect to his claim for invasion of privacy, the Appeals Court held that respondent's actions did not violate the statutory right to privacy enjoyed by citizens of the Commonwealth under Mass. G.L. c. 214, § 1B. Finally, the Appeals Court held that the trial judge was not required to disqualify himself from hearing respondent's motion for summary judgment. The opinion of the Appeals Court is reprinted in full as Appendix G to petitioner's combined jurisdictional statement and petition for writ of certiorari.

Following entry of the opinion of the Appeals Court, petitioner sought further appellate review in the Supreme Judicial

[2] In the wake of this Court's decision in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), the Supreme Judicial Court for the Commonwealth of Massachusetts ruled that "private" individuals could recover on a claim for libel by proving negligent publication of a defamatory falsehood. *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 850-851 (1975).

Court, the Commonwealth's highest appellate court. Under state law, review in that court following an opinion of the Appeals Court is discretionary and is granted only for substantial reasons affecting "the public interest or the interests of justice." Mass. G.L. c. 211A, § 11. By order entered September 28, 1979, the Supreme Judicial Court exercised its discretion in favor of denying further appellate review. The Supreme Judicial Court's order appears at Appendix H to the combined jurisdictional statement and petition for a writ of certiorari petitioner has filed here. The present proceedings in this Court followed.

II. Reasons Why the Appeal Should be Dismissed and a Writ of Certiorari Should Not be Granted.

A. The Appeal Presents No Substantial Federal Question.

Petitioner's claim that, on its face and as applied to him, Mass. R. Civ. P. 56 denied to him a right to a jury trial guaranteed by the Seventh and Fourteenth Amendments to the Constitution of the United States is an insubstantial, if not frivolous, claim. In the first place, this Court has held that the right to a jury trial guaranteed by the Seventh Amendment to the Constitution does not apply to trials in state courts. *See, e.g., Alexander* v. *Virginia*, 413 U.S. 836 (1973); *Melancon* v. *McKeithen*, 345 F. Supp. 1025 (E.D. La. 1972), *aff'd mem.* 409 U.S. 943 (1972). Beyond that, even if one were to assume that petitioner had some federal right to a jury trial in a state court, it is surely too late to argue that a state provision for summary judgment violates that right, particularly in view of the length of time summary judgment procedures have existed, in one form or another, in virtually all of the courts of this na-

tion. *See generally*, 10 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2711, pp. 364-370 (1973).[3]

B. The Questions Presented by Petitioner for Review by Certiorari Meet None of the Requirements of Rule 19.

Under United States Supreme Court Rule 19, it is clear that review by way of certiorari is available only in a limited number of circumstances. None is present here.

The first question presented by petitioner — in essence, whether rights guaranteed by the Constitution were denied to him by the manner in which the Commonwealth's Appeals Court articulated its decision — is frivolous. Nothing in the record supports the conclusory allegations presented by petitioner's formulation of that first question at page 6 of his combined jurisdictional statement and petition, and even a cursory review of the Appeals Court's decision reveals that it is carefully considered and thoughtfully framed. Moreover, petitioner cites nothing in the way of precedent, from this Court, from any other federal court, or from any state court, which gives meaningful flesh to the skeletal arguments he has voiced in formulating that first question.

Petitioner's second question — whether the "cumulative handling" of his case at all levels of the Massachusetts courts has "restored" to the press an absolute immunity from actions for libel or invasion of privacy — is not truly a federal question at all. With certain conceivable exceptions not relevant here, tort law, and the rights and correlative duties thereby recognized, are wholly the product of state law. *See generally*,

[3] Although he now appeals *pro se*, and although he appeared *pro se* in the appellate proceedings below, petitioner was represented by counsel at and before the summary judgment hearing.

New York Central R.R. Co. v. *White*, 243 U.S. 188 (1917); *Mountain Timber Co.* v. *Washington*, 243 U.S. 219 (1917); *Pinnick* v. *Cleary*, 360 Mass. 1, 12-14 (1971); Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1954). The federal Constitution may have something to say, as it surely does in connection with actions for libel and invasion of privacy, concerning how far state rules governing the imposition of tort liability may go. *See, e.g., Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). The Constitution does not require, however, that a state have any such rules. Accordingly, to assert that a decision of a state court has, in effect, abolished actions for libel or for invasion of privacy does not implicate in the least any provision of the federal Constitution.

Beyond that, even if there is, somewhere, a federal right to freedom from libelous statements made, or invasions of privacy committed, by a private citizen, the opinion of the Appeals Court did not trench on that right. Instead, it simply resolved petitioner's claim with respect to libel on the basis of its conclusion that respondent had not been negligent and resolved petitioner's claim for invasion of privacy on the ground that respondent's actions did not invade the right of privacy created by state statute. Neither of those grounds for resolution implicates, in even the vaguest way, any federal right.

Petitioner's third question — concerning the Appeals Court's resolution of his claim that the trial judge should have disqualified himself, *sua sponte* — is also frivolous. The Appeals Court's treatment of that issue appears at page G7 of the combined jurisdictional statement and petition for a writ of certiorari petitioner has filed with this Court. However the matter is handled under state law, surely the bare fact of prior contact between counsel for respondent and the trial judge on a matter wholly unrelated to the claims asserted by petitioner is not sufficient to raise a substantial question which implicates a federal right. That conclusion necessarily follows, *a fortiori*,

from cases such as *Hortonville Joint School District No. 1* v. *Hortonville Educ. Ass'n*, 426 U.S. 482 (1976); *Withrow* v. *Larkin*, 421 U.S. 35 (1975); *Murphy* v. *Florida*, 421 U.S. 794 (1975).

III. Conclusion.

In light of the foregoing, respondent respectfully submits that the questions upon which this cause depends are so insubstantial as not to need further argument and, as a result, moves that the appeal be dismissed and the petition for certiorari be denied.

Respectfully submitted,

JAMES F. McHUGH,
BINGHAM, DANA & GOULD,
100 Federal Street,
Boston, Massachusetts 02110.
Attorney for the Appellee-Respondent.

Dated: January 18, 1980.

Supreme Court, U.S.
FILED
JAN 25 1980
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-971

ANGELO CEFALU
APPELLANT–PETITIONER

v.

GLOBE NEWSPAPER COMPANY
APPELLEE–RESPONDENT

APPEAL FROM AND PETITION FOR A WRIT OF CERTIORARI TO
THE MASSACHUSETTS APPEALS COURT

Reply Brief
Of the Appellant-Petitioner
in opposition to the Motion to Dismiss and to the Brief
in Opposition to Petition for a Writ of Certiorari.

Angelo Cefalu, *pro se*
Appellant-Petitioner,
34 Avondale Street,
Dorchester, Mass. 02124.
1-617-296-3222

In the
Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-971

ANGELO CEFALU
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v.

GLOBE NEWSPAPER COMPANY
APPELLEE–RESPONDENT

APPEAL FROM AND PETITION FOR A WRIT OF CERTIORARI TO
THE MASSACHUSETTS APPEALS COURT

Reply Brief
Of the Appellant-Petitioner in opposition to the Motion to Dismiss and to the Brief in Opposition to Petition for a Writ of Certiorari.

This reply is necessitated by the Appellee-Respondent attempt to prejudice this Court both by argument and by misrepresentations.

On the Proceeding Below

If he is trying, as it appears that he does, to give the impression that appellant sued only because a photograph was published, which showed him to be an unemployed man collecting benefits while he was not, the appellee-respondent is certainly and smoothly making a gross misrepresentation of the cause of this litigation, which, in reality, started because of the damage caused by the defamatory content of the April 23, 1973 article, which is conveniently left unmentioned.

Although this is not the place or time to attract the attention

of this Court to the merits of the case, I have to mention the misrepresentation because it is an insidious attempt to prejudice this Court to think that I, the appellant brought suit frivolously and not because I was really hurt.

Misrepresentations like this and worse, which in a juryless environment have been easily effective against the awkward *pro se* appellant, have helped this case reach this Court, although we are here mainly because of the state's courts insensitivity to federal constitutional requirements.

On the Appellee's treatment of the Appeal's question.

Appellee has misrepresented that my claim is that Mass. R. Civ. P. 56 denies the right of jury trial "on its face". (Motion to dismiss page 5 II A). My claim (see jurisdiction statement) is that the rule is unconstitutional for denying the right to jury trial when it is compulsorily applied with finality in cases which by their very nature call for a jury trial, as guaranteed by the Seventh Amendment and, superfluously, by the "privileges and immunities" clause of the Fourteenth Amendment. Incidentally, as already hinted in the Jurisdictional Statement (page 24, line 7), as the right to a jury trial in this case can be seen to be founded also otherwise, namely in the very Massachusetts Constitution, creating thus a context different from *Alexander v. Virginia, 413 U.S. 836* and cases therein cited, the use of rule 56 should involve also the "due process" clause.

The appellee's argument of "the length of time that summary judgment procedures have existed, in one form or another," is devious to say the least. Summary judgment was never available in Massachusetts in tort cases, (see Jurisdictional Statement page 25), and I doubt if it was permissible in other jurisdictions.

It has been applied to these cases, at least to the instant one, by means of Rule 56, since its recent appearance. This rule not only is very young, but it was also drawn under the 28 U.S.C. 2072 Enabling Act which provides that it (the rule) shall not abridge, enlarge or modify any substantive rights. This Court, moreover, as it was mentioned in the Jurisdictional Statement at page 26, has already been alarmed in *Hutchinson v. Proxmire, 47 U.S.L.W. 4827, 4830, No. 9,* by the general and indiscriminate use of such Rule 56.

The thrust of *Alexander v. Virginia* was that "since Code #18.1-236.3 (Virginia) was not in force when the Constitution of the United States was adopted, a jury trial is not constitutionally required." *Alexander v. Commonwealth (Virginia) 182 S.E.2d. 43, 44(2).* Here the issue is different more general and touching the interest of all the American people. The narrowly aimed and summary decisions of Alexander v. Virginia and of the cases therein cited cannot dispose of it. After one is finally aware of the circumstances of those decisions, he cannot be any longer convinced that this Court has already even decided that the states courts' denial of a jury trial is not lacking in due process, as many have led us in to believe.

We, the people are entitled to a clear debate and a clear decision by this Court on such an important issue as jury trial and better people than I am should be invited to spend a little time and participate in the process of finding out whether we all have and should Americanly retain the power, or only some of us. The issue, indeed, involves the very basic question of whether in our land we all, as a people, ever had and do retain the ultimate power and are being served by our (whatever) government, or the latter has usurped that power and is actually ruling us.

On the treatment of the certiorari questions.

In dealing with the certiorari questions the applee-respondent chooses again to misrepresent what the appellant has said in the jurisdictional statement. Claiming it to be "difficult to understand fully" he does to this Court the favor to reconstruct the first question and in the process conveniently misrepresents that appellant has claimed that "rights guaranteed by the Constitution were denied to him by the manner in which the Commonwealth Appeals Court *articulated* its decision", when it is very clear, both in the statement of the question and in the argument treating it (Jurisdictional Statement 6-7, 26-32), that it was the process and the manner used to reach the decision that is lamented to be offensive to the Constitution. Is the appellee thinking that the appellant's jurisdictional statement will not be read by the Justices of this Court?

At page 7 of his motion to dismiss appellee also claims that the second certiorari question is not truly federal because "...a state court (can), in effect abolish actions for libel or for invasion of privacy...without implicat(ing) in the least any provision of the federal Constitution". That is certainly scary although also dubious. But even if it were possible for the state to do so, will the appellee at least concede that it could not do it in the name of the First Amendment of the federal Constitution, as it practically did at the end of the appeals court decision when it was concluded that "First Amendment freedoms require that this case be closed."? (Jurisdictional Statement App. G-8)

However, although when the media are involved it may work as if it did, Massachusetts has not yet claimed to have abolished actions for libel and invasion of privacy and it is, therefore, required to treat them with due process and with respect and

concern for the priviledges and all the other constitutional rights of the parties involved. And due process includes assuring a jury trial which, if it is opted for, is guaranteed not only as a priviledge under the federal Constitution, but also by the state Constitution, on top of everything.

Finally Appellee-Respondent tries to give the impression that the third certiorari question is a lamentation of what the appeals court found, when the Appellant-Petitioner has clearly stated and argued in his jurisdictional statement that it is not what the appeals court wrongly found, or pretended to have found, that is of importance to this Court, but the fact that, in order to explain what it pretended to have found, the appeals court resorted to the concealment of facts and affidavits and the concealment of the main body of the applicable law and the changing of words in the part of that law that it chose to use. (Mass. Supreme Judicial Court General Rule 3:25, Cannon 3 C (1), Jurisdictional Statement App. B-3)

Upon review by this court it will be easily seen that both the acting of the trial judge and of the appeals court have a lot to do with the federal and civilized requirements of due process and equal protection and respect of the basic rights of the IX Amendment.

Conclusion

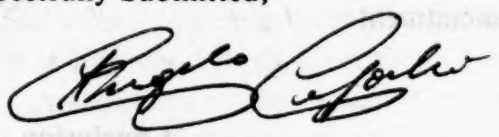
As we at this stage are only involved in convincing this Court to allow a debate on the question in appeal, the Appellee's argument at page 5 of his Motion to Dismiss, against the appeal's "jury-summary judgment" question must be interpreted as begging this Court not to give the opportunity for such debate.

What is the Appellee's motive? To win this case? But here we are not dealing with the merits of the case, although these, having never been dealt with, at some time should be considered, if only to be fair. We are here on appeal because we have stumbled in a too important issue, which should interest all Americans, as it does.

Although it is strange that the Appellee, a big newspaper which portrays itself as a guardian and watchdog of the people's interests, should disagree with the idea that the people anywhere in this land has and needs a right to a jury trial, not to be sacrificed for summary judgment or what this is claimed to ~~be~~ accomplish, it is certainly entitled to air its opposing view, but it should not do it now. At this stage it should join me, the appellant, to ask from this Court the opportunity for a debate, loudly and Americanly, and out of a sense of duty toward the very people that it constantly and presumptuously claims to represent.

Winning a particular case does not give anybody the right or excuse to hinder the defense of what, being more than a constitutional right, is perhaps the best and clearest expression of our concept of government.

Respectfully Submitted,



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Dated: January , 1980